04 6964

No. 04-_____

IN THE SUPREME COURT OF THE

UNITED STATES

October term, 2004

ORIGINAL

Supreme Court, U.S.
FILED
OCT 22 2004
OFFICE OF THE CLERK

JAY SHAWN JOHNSON, Petitioner

vs.

STATE OF CALIFORNIA, Respondent

MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

Petitioner Jay Shawn Johnson asks leave to file the accompanying petition for writ of certiorari without prepayment of costs, and to proceed in forma pauperis. Petitioner has continuously been granted leave to so proceed. This Court granted him in forma pauperis status in his prior case at this Court, Johnson v. California, case #03-6539. He has been represented by court-appointed counsel at the trial court (by the local public defender's office) and on appeal, including at this Court (by the undersigned). Petitioner has been continuously imprisoned on this case since February, 1996. Petitioner's affidavit in support of this motion is attached hereto.

Dated: Oct. 20, 2004

STEPHEN B. BEDRICK*
Attorney at Law
1970 Broadway, Suite 1200
Oakland, CA 94612
(510) 452-1900

*Counsel of record for Petitioner

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No. 04 - ____

IN THE SUPREME COURT OF THE

UNITED STATES

October Term, 2004

JAY SHAWN JOHNSON, Petitioner

vs.

STATE OF CALIFORNIA, Respondent

AFFIDAVIT IN SUPPORT OF MOTION
TO PROCEED IN FORMA PAUPERIS

I, Jay Shawn Johnson, being first duly sworn, depose and say that I am the Petitioner in the above entitled case; that in support of my motion to proceed without being required to prepay fees, costs, or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor, and that I believe I am entitled to redress.

I further swear that my responses to the questions and instructions below relating to my ability to pay the cost of proceeding in this Court are true:

1. Are you presently employed? Yes. ____ No. \

a. If the answer is yes, state the amount of your salary or wages per month and give the name and address of your employer.

---

b. If the answer is no, state the date of your last employment and the amount of the salary and wages per month which you received.

I don't recall, it was 8 and a half years ago

ORIGINAL

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Supreme Court, U.S.
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No. 04 - ____

IN THE SUPREME COURT OF THE

UNITED STATES

October Term, 2004

JAY SHAWN JOHNSON, Petitioner

vs.

STATE OF CALIFORNIA, Respondent

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

STEPHEN B. BEDRICK
Counsel of Record
Attorney at Law
1970 Broadway, Suite 1200
Oakland, CA 94612
Phone: (510) 452-1900
Fax: (510) 452-1980

ERIC SCHNAPPER
University of Washington
School of Law P. O. Box 353020
Seattle. WA 98195
Phone: (206) 616-3167
Fax: (206) 685-4469

Counsel for Petitioner

12

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, or other source? Yes. ____ No. ___\

a. If the answer is yes, describe each source of income, and state the amount received from each during the past twelve months.

_____

3. Do you own any cash or checking or savings account (include any funds in prison accounts)? Yes. ____ No. ___\

a. If the answer is yes, state the total value of the items owned.

_____

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)? Yes. ____ No. ___\

a. If the answer is yes, describe the property and state its approximate value.

_____ _____

5. List the persons who are dependent upon you for support and state your relationship to those persons.

None

I declare under penalty of perjury that the foregoing is true and correct.

Executed on Sept 14, 2004, at Vacaville, California.

Jay Shawn Johnson

JAY SHAWN JOHNSON

QUESTION PRESENTED

Whether to establish a prima facie case under Batson v. Kentucky, 476 U.S. 79 (1986), the objector must show that it is more likely than not the other party's peremptory challenges, if unexplained, were based on impermissible group bias?

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No. 04 - _____

IN THE SUPREME COURT OF THE

UNITED STATES

October Term, 2004

JAY SHAWN JOHNSON, Petitioner

vs.

STATE OF CALIFORNIA, Respondent

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

Petitioner JAY SHAWN JOHNSON respectfully requests that a Writ of Certiorari issue to review the judgment of the California Supreme Court entered June 30, 2003.

Last term, on December 1, 2003, this Court granted certiorari in this case, Johnson v. California, #03-6539, to review this judgment, and to decide the same question presented here, namely, whether the California test for a prima facie case of racial discrimination in jury selection complies with Batson v. Kentucky, 476 U.S. 79 (1986).

The case was fully briefed, and oral argument was held on all topics. However, on May 3, 2004 the Court dismissed the case for lack of jurisdiction, due to lack of a final judgment, because some non-Batson issues had not yet been decided by the state courts. Johnson v. California, ____ U. S. ____, 124 S.Ct. 1833 (2004).

These issues have now been decided. On August 5, 2004, after remand, the California Court of Appeal decided all the remaining non-Batson issues, and affirmed Petitioner's conviction. On October 20, 2004 the California Supreme Court denied

review. The state judgment is now final, within the meaning of 28 U. S. C. §1257(a).

OPINIONS BELOW

(1) On April 5, 2001, the California Court of Appeal reversed Petitioner's conviction because the trial court erred in failing to find a prima facie case of racial discrimination in jury selection under Batson. People v. Johnson, case #A085450, formerly reported at (2001) 88 Cal.App.4th 318. (Opinion attached as Appendix A)

(2) On June 30, 2003 the California Supreme Court reversed the Court of Appeal's decision on the Batson issue and upheld the trial court ruling, denying a prima facie case. People v. Johnson (2003) 30 Cal.4th 1302 [1 Cal.Rptr.3d 1, 71 P.3d 270]. (Opinion attached as Appendix B)

(3) On December 1, 2003, this Court granted certiorari, Johnson v. California, case# #03-6539, to review the decision by the California Supreme Court, but on May 3, 2004, after oral argument, this Court dismissed the case for lack of jurisdiction, due to lack of a final judgment. Johnson v. California, ____ U. S. ____, 124 S.Ct. 1833 (2004) (Opinion attached as Appendix C)

(4) On August 5, 2004, on remand, the California Court of Appeal decided all the remaining non-Batson issues. It affirmed Petitioner's conviction. It determined that the California Supreme Court's June 30, 2003 opinion foreclosed it from revisiting the Batson issues. People v. Johnson, case #A085450, and #A106431. (Opinion attached as Appendix D)

(5) On October 20, 2004 the California Supreme Court denied review, People v. Johnson, case #S127602. (Order attached as Appendix E)

JURISDICTION

Subject matter jurisdiction arises here under 28 U.S.C. §1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the equal protection clause of the Fourteenth Amendment to the

United States Constitution, which provides: "Nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE AND OF THE FACTS

This petition presents the identical question and identical facts on which the Court granted certiorari on December 1, 2003 in Johnson v. California, case #03-6539.

As to the crime: Petitioner Jay Shawn Johnson was convicted in 1998 of second degree murder, California Penal Code §187, and assault on child, resulting in death, California Penal Code §273ab. Petitioner, an African-American (black) man, caused the death of Janika Price, the 18-month old daughter of his white girlfriend and another man. The issue at trial was whether the homicide was accidental or malicious.

As to jury selection: The prosecutor peremptorily challenged all three black jurors who had been passed for cause, leaving Petitioner, a black man, to be tried by a jury with no black persons on it, in a case with racial overtones.

The prosecutor did not question any of the three black jurors on voir dire before he struck them. He did not give reasons for his challenges. The trial judge speculated as to possible reasons for challenges to two of these three jurors, but said nothing about the third. The trial judge acknowledged that one of the challenged juror's "answers tend[ed] to favor the prosecution."

In denying a prima facie case on Petitioner's Batson motion, the trial court employed California's then-applicable "strong likelihood" standard, stating "there's not been shown a strong likelihood that the exercise of peremptory challenges were based upon a group rather than an individual basis." (Aug. RT 223, emphasis added) Nonetheless, the trial court did state that this set of challenges was "very close" to presenting a prima facie case. (Id.)

A divided panel of the state Court of Appeal concluded by a vote of 2-1 that Johnson had established a prima facie case under Batson, and reversed his conviction,

relying on several factors:(i) the prosecutor peremptorily challenged all three black potential jurors. (ii) The trial court erred when it stated that the standard for a prima facie case was a "strong likelihood" of discrimination. Instead, the correct test is the less stringent standard of an "inference" of discrimination under Batson. Because the trial court applied an incorrect legal standard, its ruling was not entitled to deference, and the Court of Appeal could review the issue de novo. (iii) There was no race-neutral reason on the record why two of the three black jurors, Clodette Turner and Sara Edwards, would not be suitable. (iv) The supposed reasons why the prosecutor challenged them were pretextual, because those same reasons applied to several white jurors whom he accepted.

The California Supreme Court, by a vote of 5-2, reversed the Court of Appeal, and affirmed the trial court's finding of no prima facie case. The majority held: (i) To establish a prima facie case under Batson, a party must demonstrate "that it is more likely than not that the other party's peremptory challenges, if unexplained, were based on impermissible group bias." People v. Johnson, 30 Cal.4th at 1306. (ii) Where a trial judge, relying on such a standard, has concluded that there was no prima facie case, affirmance on appeal is required "if the record suggests grounds on which the prosecutor might reasonably have challenged the jurors." People v. Johnson, 30 Cal.4th at 1325 (emphasis added). (iii) A defendant is barred from arguing on appeal that these "suggested" grounds were pretextual, even if those grounds equally applied to white jurors who were accepted. People v. Johnson, 30 Cal.4th at 1318-1324.

Two of the seven California Supreme Court justices dissented. They maintained that to establish a prima facie case an objector need only identify evidence which would permit an inference of discrimination. Such a prima facie case was established here, because the prosecutor perempted all three black jurors, and because, as to at least two of those jurors, there is nothing on the record showing why they would not be acceptable. People v. Johnson, 30 Cal.4th at 1333, 1340, 1341.

REASONS FOR GRANTING CERTIORARI

The reasons why the Court granted certiorari a year ago still exist, and warrant a new certiorari grant. Last term the California Attorney General's office explicitly supported Petitioner's request for certiorari in the prior case, #03-6539. The State explained why in its "Brief of Respondent in Support of Petition for Writ of Certiorari" dated October 23, 2003, at pp. 3-6:

> The nature of the prima facie case burden under Batson is an important federal question, and the California Supreme Court and the Ninth Circuit have issued squarely conflicting opinions on the extent of that burden. See Sup. Ct. R. 10(b) . . . That split poses a tremendous burden on California.
>
> Using the "raise an inference" standard mandated by *Wade* [*v. Terhune*, 202 F.3d 1190 (9th Cir. 2000)] , federal habeas courts reevaluate de novo every California criminal case with a *Batson* claim in which the state court has found no prima facie case. . . . Because the state court never found a prima facie case, the trial prosecutor never had occasion to state reasons for his peremptory challenges in the trial court. This necessitates an evidentiary hearing in the federal habeas corpus proceeding at which the trial prosecutor, if available, has to testify. . . . If reasons are given, then years later . . . the district court determines whether peremptories were exercised discriminatorily. Cf. *Fernandez* [*v. Roe*], 286 F.3d 1073 [(9th Cir. 2002)] (finding prima facie case in 2002 and remanding for evidentiary hearing concerning 1995 trial). [*] . . .
>
> The split of authority should be resolved at the earliest opportunity. Nothing can be gained from allowing more cases to be affirmed in state court under the California Supreme Court's decision in this case but then, potentially, vacated on federal habeas corpus review under *Wade*.

Nothing has changed since then.

At oral argument in the prior case on March 30, 2004, and in its opinion, the Court invited Petitioner to seek certiorari again. The opinion in the prior case (#03-6539)

---

*In the instant case, the trial judge offered the prosecutor the opportunity to state reasons, but he declined.

explicitly informed Petitioner that he may seek certiorari again, once he obtains a final judgment in state court. Johnson v. California, 124 S.Ct. at 1835. That has been done.

During oral argument in the prior case (#03-6539), in the rebuttal portion, when counsel for Petitioner urged the Court to decide the issue on the merits, because he feared that, otherwise, resolution would never be reached, the following colloquy occurred:

> MR. BEDRICK [counsel for Petitioner]: . . . I'd respectfully ask the Court to reach this issue.
>
> In terms of what would happen if the States -- at the State court, I don't think I -- I could never get back to this Court or anywhere else. . . .
>
> I will then be trying to come to this Court, having gotten no opinion from the court of appeal, having gotten a postcard denial from the State supreme court and would not be able to get here. I think that will be --
>
> QUESTION: Yes, you would. You'd have a --
>
> QUESTION: We'll be waiting. (Laughter.)
>
> QUESTION: You'd have a decision from the highest Court in the State that has ruled on it, and you could -- you could come here. You would have then -- let's say you have a judgment affirming the conviction. You could come here from that.
>
> MR. BEDRICK: If that was a guaranteed invitation, Your Honor, I would accept it. (Laughter.)
>
> QUESTION: We will -- we will already have done the work. Your odds are better than most people. (Laughter.) (transcript of oral argument, pp. 52-53)

Insofar as that colloquy invited Petitioner to return to the Court to have the case decided on the merits, once the state decision became final, Petitioner gratefully accepts that invitation.

ARGUMENT

I.

CERTIORARI SHOULD BE GRANTED BECAUSE THERE IS A DIRECT CONFLICT BETWEEN THE CALIFORNIA COURTS AND THE FEDERAL COURTS

A renewal of certiorari is warranted, because California continues to deviate from the principles established by this Court in Batson and its progeny. Unless this Court corrects the current decision, future California decisions will continue to violate Batson in several ways, and will continue to violate the equal protection rights of minority citizens to serve on juries.

(1) First, the California Supreme Court has refused to follow the directive of this Court in Batson that a prima facie case of discrimination arises whenever there is an "inference" of discrimination. Instead, the California Supreme Court erected in this case a much higher barrier before a prosecutor will be required to explain the reasons for his challenges. That court held here that an objecting party must show by a preponderance of the evidence ("more likely than not") that a challenge is racially-based before even a prima facie case of discrimination is presented, and before the prosecutor must state his reasons. People v. Johnson, 30 Cal.4th at 1306.

This test creates a much higher threshold for a prima facie case than Batson's "inference" standard. This test will result in a reduced level of scrutiny of race-based challenges to minority jurors, in violation of Batson. This test will severely weaken the 14th Amendment equal protection right of minority citizens to serve on juries.

(2) Second, California allows appellate courts, in reviewing the denial of a prima facie case, to speculate as to possible race-neutral reasons for challenging a minority juror, even if the prosecutor gave no reason, and then to affirm if there is anything in the record which might provide a rational basis for such speculation. People v. Johnson, supra, 30 Cal.4th at 1325. This raises the prima facie threshold to an almost unreachable level.

The Question Presented last year and reasserted this year acknowledges that Batson requires a prima facie case to be evaluated while the challenge is "unexplained." "Unexplained" means without a reason being given. That means both "unexplained" by the challenger, and "unexplained" by anyone else, meaning that no one else may make assumptions or guesses as to the challenger's reasons. That is because Batson only provides for consideration of the prosecutor's actual reason, and not for consideration of conjectured or merely possible reasons.

Written speculation, after the fact, on appeal -- as the California Supreme Court did here -- as to possible justifications is not proper. Under Batson, once a prima facie case has been established, "the prosecutor must articulate a neutral explanation." Batson, 476 U. S. at 98 (emphasis added). The prosecutor must do so personally by a statement in open court. This Court has emphasized the importance of demeanor evidence in resolving Batson claims. Hernandez v. New York, 500 U. S. 352, 365, 114 LEd.2d 395, 111 S.Ct. 1859 (1991). That demeanor evidence would be unavailable if a prosecutor were permitted at step two to respond after the fact with a written explanation of his actions. Thus, the state's burden may not be satisfied through written arguments by an appellate attorney, with or without personal knowledge of the reason for the peremptory challenge. A fortiori, a court cannot itself assume the prosecution's burden and hypothesize possible explanatory motivations.

(3) Third, this misuse of speculative reasons is aggravated still further. The California Supreme Court, virtually alone among all state and federal jurisdictions, refuses to examine whether these speculative reasons would also apply to white jurors who have been accepted. If so, that would constitute strong evidence that the claimed reasons for the challenge to the minority juror are pretextual. Miller-El v. Cockrell, 537 U. S. 322, 123 S.Ct. 1029, 1043-1044 (2002). However, the California courts refuse to apply even that limited degree of scrutiny to speculative reasons, even though that refusal is contrary to Miller-El.

For all these reasons, certiorari is warranted now, as it was a year ago. Further,

conflict has continued between the California courts and the federal courts on all these Batson issues. The California Supreme Court has continued to apply the preponderance of the evidence ("more likely than not") standard for finding a prima facie case of discrimination in jury selection. It has continued to allow trial and appellate courts to speculate as to a prosecutor's reasons for his challenges. People v. Cleveland (2004) 32 Cal.4th 704, 732 [86 Cal.Rptr.3d 302, ____ P.3d ____] (applying "more likely than not" test for prima facie case; allowing appellate court to speculate as to possible reasons for challenges after prosecutor declined to state any); People v. Yeoman (2003) 31 Cal.4th 93, 114 [2 Cal.Rptr.3d 186; 72 P.3d 1166] (allowing appellate court to speculate as to possible reasons for challenges after prosecutor declined to state any, but refusing to apply comparative juror analysis to determine whether those supposed reasons would be pretextual).

Similarly, the Ninth Circuit has continued to find the California standards constitutionally defective in all these particulars. In Paulino v. Castro, 371 F.2d 1083 (9th Cir. 2004) (opinion by Kozinski, J.) the Ninth Circuit granted habeas relief because the prima facie Batson test used by the California courts was constitutionally defective. The Paulino court found that California's prima facie test was wrong in two particulars. (i) A prima facie case of a Batson violation should be found when there is an "inference" of discrimination. Thus, California's "more likely than not" test is defective, because that threshold is unduly elevated. (ii) Paulino also held that the trial court may only rely upon the prosecutor's stated reasons, and not upon hypothetical or possible reasons. Paulino v. Castro, supra, 371 F.3d at 1089-1092.

Because California courts continue to conflict with the federal courts on all these principles, a renewal of the grant of certiorari is warranted.

II.

CERTIORARI SHOULD BE GRANTED BECAUSE THE CALIFORNIA DECISION IS CONTRARY TO DECISIONS OF THIS COURT

Because this case was fully briefed and orally argued only months ago, Petitioner only outlines, but does not repeat in detail, his arguments from the prior briefing in case #03-6539 as to why the California standards do not comply with Batson.

(1) The California "more likely than not" prima facie test violates the directive in Purkett v. Elem, 514 U.S. 765, 131 L.Ed.2d 834 (1995) that the three steps of Batson analysis must be evaluated separately and must not be conflated. As the Court held in Purkett v. Elem:

> [O]nce the opponent of a peremptory challenge has made out a prima facie case of racial discrimination (step one), the burden of production shifts to the proponent of the strike to come forward with a race-neutral explanation (step two). If a race-neutral explanation is tendered, the trial court must then decide (step three) whether the opponent of the strike has proved purposeful racial discrimination. *Hernandez v. New York*, 500 U.S. 352, 358-359 (1991) (plurality opinion) id., at 375 (O'Connor, J., concurring in judgment); *Batson, supra,* at 96-98.

This test requires separate analysis at each of the three steps. In Purkett v. Elem the Court reversed because the circuit court improperly conflated steps two and three. It conflated those steps when it required that the "justification tendered at the second step be not just neutral but also at least minimally persuasive, i.e. 'plausible.'" Id., 514 U. S. at 768. That conflation was defective, because it improperly required the prosecutor to show at step two not only that his reason was race-neutral (the step two requirement) but also that it was plausible and persuasive (the step three issue).

The California test in Johnson is similarly and incorrectly conflated when it requires the objector to satisfy the same burden of proof at the prima facie stage (step one), before he has heard the challenger's reasons, as he must meet at the merits stage (step three), after he has heard the challenger's reasons -- namely, proof that discrimination is more likely than not.

Instead, the prima facie test should be stated as follows: To establish a prima facie case, the objector should identify sufficient evidence in the record to allow a finding that the other party's peremptory challenges, if unexplained, were based on impermissible group bias. This type of inference is referred to as a permissive inference. See, e.g., Ulster County Court v. Allen (1979) 442 U. S. 140, 156. That is the test which is utilized by the federal Courts of Appeals. That is the test which was stated by the dissent at the California Supreme Court, namely, that the objector should adduce evidence sufficient to permit an inference of discrimination. People v. Johnson, supra, 30 Cal.4th at 1334-1339 (Kennard, J. dissenting). Such standard is consistent with the rule in virtually every jurisdiction in the nation except California. This standard should be applied here.

(2) The California Supreme Court's "more likely than not" test presents too high a threshold for a prima facie Batson case.

The purpose of a prima facie finding on a Batson challenge is to allow the objector to obtain, and the trial court to hear, the challenger's reason. Because this is akin to a discovery motion, it would violate the entire Batson process to require an objector to prove discrimination by a preponderance of the evidence ("more likely than not") at the prima facie stage, before obtaining discovery, namely, the prosecutor's claimed reasons. Such a test would require the objector to try to prove at the prima facie stage that discrimination was more likely than not, before obtaining the evidence he needs to prove that discrimination was more likely than not. Such a cart-before-the-horse procedure would violate due process, just as it would violate due process to require a civil plaintiff to prove his case on the merits in order to get discovery. See, e.g., Swierkiewicz v. Sorema, 534 U. S. 506, 511-512, 152 L.Ed.2d 1, 122 S.Ct. 992 (2002).

(3) The California courts distort the entire Batson process when, at the prima facie stage, they search the record for possible race-neutral reasons why someone might have challenged a juror, without any evidence that that the prosecutor actually employed such a reason.

When the "Question Presented" uses the term "if unexplained," that means (a)

before any party states an explanation for a challenge, and (b) before anyone else speculates as to a hypothetical or theoretical explanation.

Speculation at the prima facie stage as to possible reasons for challenges wrongly conflates Batson's step one analysis (prima facie case) with step three (evaluation of the prosecutor's actual explanations and decision on the merits). This improper conflation, like that discussed supra, violates the rule of Purkett v. Elem. It disobeys the rule that there must be separate analysis at each of the three Batson steps. At step one the court is to decide whether the evidence relied upon by the objector is sufficient "if unexplained" to create a prima facie case. At step one the court is not to consider possible explanations offered by the prosecutor, hypothesized by appellate counsel, or thought up by the court itself. "Unexplained" means just that -- unexplained.

Such speculation as to possible explanations is wrong in another way. Batson only provides for consideration of the prosecutor's actual reason, and not for consideration of conjectured or theoretically possible reasons. When there is no proof that the conjectured reasons reflect the prosecutor's real motivation, they should not be relied upon, because they "cannot be mistaken for the actual reasons for a [peremptory] challenge." Mahaffey v. Page, 162 F.3d 481, 483-484, n. 1 (7th Cir. 1993); Riley v. Taylor, 277 F.3d 261, 282 (3d Cir. 1999) (en banc) ("Apparent or potential reasons do not shed any light on the prosecutor's intent or state of mind when making the peremptory challenge"); Bui v. Haley, 321 F.3d 1304, 1313-1314 (11th Cir. 2003) (*post hoc* suggestion of reasons by second lawyer is not adequate substitute for actual reasons used by first lawyer).

(4) The California test obstructs the battle to eliminate racial discrimination in jury selection.

Until a prima facie case is established, the objector does not have access to the information needed to show whether a challenge is discriminatory, namely, the claimed reason for a challenge. If the barrier for establishing a prima facie case is set too high -- as the California courts did here, when they refused to make inquiry even after the

prosecutor perempted all three black jurors -- the necessary evidence for evaluating possible discrimination will be absent, and judicial scrutiny of possible discrimination will be unduly reduced.

The purpose of a prima facie case under Batson "'is to help courts and parties answer, not unnecessarily evade, the ultimate question of discrimination, *vel non*.'" Jones v. Plaster, 57 F.3d 417, 421 (4th Cir. 1995), quoting from United States Postal Service Bd. of Governors v. Aikens, 460 U. S. 711, 714, 103 S.Ct. 1478, 75 L.Ed.2d 403 (1983). That purpose will only be satisfied by a sufficiently relaxed prima facie standard which encourages, not discourages, learning the reasons for challenges to minority jurors.

WHEREFORE, for all these reasons, Petitioner prays that the Court grant certiorari again, so that the Court may complete the work on this case which it started, but did not finish, last term.[2]

Dated: Oct. 21, 2004

STEPHEN B. BEDRICK
Counsel of Record
Attorney at Law
1970 Broadway, Suite 1200
Oakland, CA 94612
Phone: (510) 452-1900
Fax: (510) 452-1980

ERIC SCHNAPPER
University of Washington
School of Law P. O. Box 353020
Seattle. WA 98195
Phone: (206) 616-3167
Fax: (206) 685-4469

Counsel for Petitioner

Stephen B. Bedrick

[2]Petitioner wishes to note that another, unrelated Johnson v. California case, Garrison Johnson v. California, case 03-636, is already on the docket for the 2004 term. (Garrison Johnson is a civil rights suit challenging racial discrimination in prisoner housing.)

APPENDIX A

COPY

SEE DISSENTING OPINION
CERTIFIED FOR PARTIAL PUBLICATION*
IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

FILED
Court of Appeal - First App. Dist.
APR 5 - 2001
RON D. BARROW, CLERK
By _____ DEPUTY

THE PEOPLE,
Plaintiff and Respondent,
v.
JAY SHAWN JOHNSON,
Defendant and Appellant.

A085450

(Contra Costa County
Super. Ct. No. 96-0691-4)

I.

Jay Shawn Johnson was convicted of second degree murder and assault resulting in the death of a child under the age of eight (Pen. Code, §§ 187, 273ab) upon retrial after a partial reversal on his first appeal. The murder victim was Janika Price, the 19-month-old daughter of Jennifer Shelton with whom appellant was romantically involved. In the first appeal, we affirmed appellant's conviction of corporal injury on a cohabitant, Jennifer Shelton (Pen. Code, § 273.5), and reversed his convictions of second degree murder and assault on a child leading to death for error in jury instructions on the cause of death. Appellant was retried in December 1998, and was sentenced to 15 years to life imprisonment on the murder conviction to run concurrently with the three-year term for corporal injury on a cohabitant.

Appellant raises a number of evidentiary issues, as well as a claim that the trial court erred when it failed to find a prima facie case of a *Wheeler* (*People v. Wheeler*

* Pursuant to California Rules of Court, rules 976(b) and 976.1, this opinion is certified for publication with the exception of part II.

(1978) 22 Cal.3d 258) violation. We conclude a prima facie case of group bias was established and that the judgment must therefore be reversed. In the unpublished portion of this opinion we set forth factual details unrelated to the *Wheeler* issue that bear upon evidentiary questions that are addressed to provide guidance to the trial court upon retrial.

DISCUSSION

I.

Appellant, who is African-American, contends the prosecutor improperly used peremptory challenges to excuse three African-American prospective jurors because of their race, which completely eliminated African-Americans from the jury. Appellant made two motions for a mistrial under *People v. Wheeler, supra*, 22 Cal.3d 258 for racial discrimination in jury selection. Both were denied for failure to present a prima facie case.

The first *Wheeler* motion was directed to the prosecution's challenges to "three African-American women," namely Clodette T., Sara E., and Bernice L.[1] Defense counsel argued there were no valid race-neutral justifications for these challenges. Finding no prima facie case had been established, the court denied the motion, adding: "[h]owever, I would indicate that we are very close, Mr. Brown [prosecutor]."

The second *Wheeler* motion was made the next day, in response to the prosecutor's peremptory challenge to another African-American woman, Ruby L. Defense counsel maintained that the prosecutor's peremptory challenge of every African-American seated reflected a systematic attempt to exclude African-Americans from the jury panel. In denying the motion, the court noted that it found Ms. L.'s answers sufficient to justify a peremptory challenge in that her answers to the questionnaire raised concerns about her ability to understand the proceedings. As to Sara E., the court noted that she had omitted in her questionnaire the information about a parent's arrest for robbery some 30 years earlier. The court also recalled that Ms. E. had indicated concern

1 Bernice L. was later dropped from the motion after it was ultimately determined that her racial background was "Indian."

about whether she could be fair, even though her "answers tend to lean in favor of the prosecution." The court made no comment about the challenge of Clodette T. In denying the motion the court stated: "Even with the addition of Ms. L., the Court will not find a prima facie case. The People are [not] exercising challenges based on group bias, rather than individual bias." The court then offered the prosecutor the opportunity to make a further record, which he declined.

"The use of peremptory challenges to eliminate prospective jurors because of their race is prohibited by the federal Constitution (*Powers v. Ohio* (1991) 499 U.S. 400, 409; *Batson v. Kentucky* (1986) 476 U.S. 79, 89) and by the California Constitution (*People v. Wheeler* (1978) 22 Cal.3d 258, 276-277)." (*People v. Mayfield* (1997) 14 Cal.4th 668, 722-723.)

A.

At the time the parties briefed this case, there was a dispute about whether *Wheeler* required a greater evidentiary showing for a prima facie case than was required under *Batson*.[2] *Wheeler* states: "If a party believes his opponent is using his peremptory challenges to strike jurors on the ground of group bias alone, he must raise the point in timely fashion and make a prima facie case of such discrimination to the satisfaction of the court. First, . . . he should make as complete a record of the circumstances as is feasible. Second, he must establish that the persons excluded are members of a cognizable group within the meaning of the representative cross-section rule. Third, from all the circumstances of the case he must show a *strong likelihood* that such persons are being challenged because of their group association rather than because of any specific bias." (*Wheeler*, at p. 280, italics added.) In the next paragraph of the *Wheeler* opinion the court describes the types of evidence a party may use to show his opponent is challenging persons from the venire because of their group association. The opinion then goes on to state that "[u]pon presentation of this and similar evidence . . . the court must determine whether a *reasonable inference* arises that peremptory challenges are being used on the ground of group bias alone. (*Id.* at p. 281, italics added.) As will be seen, the separate references to "strong likelihood" and "reasonable inference" has created some confusion as to which of the two standards applies, as most courts that have addressed the question have concluded that a "strong likelihood" requires a stronger showing than a mere inference.

There is, however, no such confusion as to which standard applies under *Batson*, the federal counterpart to *Wheeler*. To establish a prima face case of discrimination under the United States Constitution, *Batson* states that a defendant must "*raise an inference* that the prosecutor used that practice [peremptory challenges] to exclude the veniremen from the petit jury on account of their race." (*Batson v. Kentucky, supra*, 476 U.S. at p. 96, italics added.) The difference in language between *Wheeler* ("strong likelihood") and *Batson* ("raise an inference") led to a dispute about whether *Wheeler* established a stricter test than *Batson*. In *People v. Fuller* (1982) 136 Cal.App.3d 403, 423, which was decided prior to *Batson*, the court acknowledged that the *Wheeler* opinion uses both phrases, but concluded "that a fair reading of *Wheeler* requires only

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[2] Appellant cited only *Wheeler* in his motions for a mistrial and did not mention the federal Constitution or the *Batson* case. The People maintain that appellant's failure to articulate the federal basis for his objection to the peremptory challenges waives the claim, citing *People v. McPeters* (1992) 2 Cal.4th 1148, 1174. In *McPeters*, the court found the defendant had waived the asserted Sixth Amendment ground by failing to raise it in connection with his *Wheeler* motion, but it nevertheless rejected the claim on its merits. (*McPeters, supra*, 2 Cal.4th at p. 1174.) Appellant denies he waived his federal rights, citing *Ford v. Georgia* (1991) 498 U.S. 411, 418-419, which held a defendant's objection to racial discrimination in jury selection was sufficient to invoke his federal right to be free of racial discrimination in jury selection under *Batson*, even if he did not cite *Batson* or describe with particularity the exact federal provision violated. (See also *Turner v. Marshall* (9th Cir. 1995) 63 F.3d 807, 811, fn. 1 [challenge framed in terms of *Wheeler* construed to allege *Batson*]; overruled on other grounds by *Tolbert v. Page* (9th Cir. 1999) 182 F.3d 677.) The debate as to whether appellant made and preserved a *Batson* claim makes sense only if, as the parties seem to believe, it is more difficult to establish a prima facie case under *Wheeler* than under *Batson*. As later discussed, our Supreme Court has recently made it clear that *Wheeler* imposes the same standard as *Batson*. The question whether appellant waived a *Batson* claim is therefore now moot.

that the court find a reasonable inference of group bias . . . ." (*Id.* at p. 423.) The *Fuller* court was "unwilling to believe that our high court intended to create different options for trial judges within one page of each other in so carefully crafted an opinion as the *Wheeler* opinion." (*Id.* fn. 25.)

The *Fuller* view of *Wheeler* was repudiated in *People v. Bernard* (1994) 27 Cal.App.4th 458 which rejected the view "that a fair reading of *Wheeler* requires only that the court find a reasonable inference of group bias." (*People v. Fuller, supra,* 136 Cal.App.3d at p. 423) According to the *Bernard* court, "a reduction of the prima facie standard to a 'reasonable inference' test would reduce the trial court's discretion and judgment at a time when it is uniquely situated to observe the nature and extent of voir dire as well as the attitude and awareness of the challenged prospective juror." (27 Cal.App.4th at p. 465) The conclusion of the *Bernard* court that a "strong likelihood" requires a stronger showing than a "reasonable inference," and that such a stronger showing must be made to establish a prima facie case of violation of the *Wheeler* rule, has been followed by other appellate courts in this state. (See, e.g., *People v. Buckley* (1997) 53 Cal.App.4th 658, 665-666; *People v. Walker* (1998) 64 Cal.App.4th 1062, 1067.)

Recently, in *Wade v. Terhune* (9th Cir. 2000) 202 F.3d 1190, the Ninth Circuit observed that since the decision in *Bernard*, "the California state courts have applied a lower standard of scrutiny to peremptory strikes than the federal Constitution permits. [¶] The California Supreme Court now routinely insists, despite *Batson*, that a defendant must show 'a strong likelihood' of racial bias. Its consistent practice is to cite *Batson* and *Wheeler* together as controlling law but to quote the 'strong likelihood' language from *Wheeler* rather than the 'raise an inference' language from *Batson*. [Citations.] *Batson* is, of course, the law of the land. California law may give greater protection to criminal defendants than is required by the federal Constitution, but it cannot give less. Yet this is precisely what the California courts now do when they follow the *Wheeler* 'strong likelihood' test in determining whether a prima facie case has been established. [¶] In our view, the *Wheeler* 'strong likelihood' test for a successful prima facie showing of

bias is impermissibly stringent in comparison to the more generous *Batson* 'inference' test." (*Id.* at pp. 1196-1197) Accordingly, the *Wade v. Terhune* court concluded that "[w]here the California courts follow the 'strong likelihood' language of *Wheeler* without any indication that they are actually applying a 'reasonable inference' test consonant with *Batson,* they apply an incorrect legal standard." (*Id.* at p. 1197.)

Wade v. Terhune also opines "that the *Wheeler* court itself understood 'a strong likelihood' to mean a 'reasonable inference.' While the *Wheeler* Court, on page 280 of its opinion, required a defendant to 'show a strong likelihood' that the prosecutor excluded venire members from the jury on the basis of race, the *Wheeler* Court phrased its central holding somewhat differently on the very next page: 'Upon presentation of this and similar evidence—in the absence, of course, of the jury—the court must determine whether a *reasonable inference* arises that peremptory challenges are being used on the ground of group bias alone.' *Id.* at 281 . . . (emphasis added). It is this language regarding a 'reasonable inference' that the Supreme Court of the United States borrowed when it formulated the *Batson* test." (*Id.* at p. 1196)

In *People v. Box* (2000) 23 Cal.4th 1153, which issued six months after *Wade v. Terhune*, our high court included a short footnote agreeing with the Ninth Circuit that "in California, a 'strong likelihood' means a 'reasonable inference'" (*id.* at p. 1188, fn. 7) and disapproving *People v. Bernard, supra,* 27 Cal.App.4th 458.[3] The Attorney General dismisses this statement as relatively insignificant. All it means, he says, is that the Supreme Court and intermediate appellate courts were always adhering to the *Batson* standard. In other words, according to the Attorney General, for *Wheeler* purposes,

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3 Prior to *Box*, our Supreme Court made no effort to clarify the ambiguity in *Wheeler*. Nor has it yet done so since *Box*. In *People v. Ayala* (2000) 24 Cal.4th 243, Justice Mosk, writing for the majority, simply states in passing that a party claiming peremptory challenges are being used to strike jurors on the ground of group bias must, among other things, "show a strong likelihood [or reasonable inference] that such persons are being challenged because of their group association . . . ." (*Id.* at p. 260, brackets in original, quoting *People v. Box, supra*, at pp. 1187-1188)

"strong likelihood" and "reasonable inference" have always meant the same thing; because the test is the same it is immaterial which phrase is used. As we shall discuss in a moment, this view, which we attribute neither to the Ninth Circuit nor our Supreme Court, conflicts with common understanding and the different meanings historically attributed by our legal system to the words at issue, would cause enormous confusion in the trial courts of this state and exacerbate the doubts that have already been raised as to the compatibility of *Wheeler* and *Batson*. Moreover, the notion that our Supreme Court not only thinks but has *always thought* that a "strong likelihood" is synonymous with a "reasonable inference" for purposes of the *Wheeler* rule, and that the lower courts of this state knew or should have known of this, was persuasively rebutted by the Ninth Circuit in *Wade v. Terhune, supra*, 202 F.3d at pp. 1196-1197.

Though not cited in *Wade v. Terhune, supra*, *People v. Sanders* (1990) 51 Cal.3d 471 demonstrates the California Supreme Court's post-*Wheeler* and pre-*Box* belief that the "strong likelihood" requirement imposes a more stringent burden that the "reasonable inference" requirement. In *Sanders*, all but four Spanish surnamed members of the venire were excused for cause either by the defense or the prosecution. When the remaining four were peremptorily challenged by the prosecution, the defendant asserted a *Wheeler* objection. The trial court denied the motion, finding the defendant had failed to demonstrate a prima facie case that the prosecutor was relying on group rather than specific bias. The Supreme Court affirmed. Acknowledging that "the removal of all members of a certain group may give rise to an inference of impropriety" under *Wheeler* (*id.* at p. 500), the Supreme Court emphasized the deference owed the trial court and primarily on that basis concluded that the "defendant failed to demonstrate a strong likelihood based on 'all the circumstances of the case' that the prosecutor's exercise of his peremptory challenges were based on group bias." (*Id.* at p. 501) After *Sanders*, most Supreme Court opinions applying the *Wheeler* rule omit any reference to the "reasonable inference" standard and focus *only* on the need to show a "strong likelihood" of group bias. (See, e.g., *People v. Welch* (1999) 20 Cal.4th 701, 745; *People v. Williams* (1997) 16 Cal.4th 635, 663-664; *People v. Mayfield* (1997) 14 Cal.4th 668, 723; *People*

v. Arias (1996) 13 Cal.4th 92, 134-135; *People v. Davenport* (1995) 11 Cal.4th 1171, 1199-1200; *People v. Turner* (1994) 8 Cal.4th 137, 164-165; *People v. Garceau* (1993) 6 Cal.4th 140, 170-171.) Indeed, the court has even italicized "strong likelihood" to emphasize the stringency of that requirement. (*People v. Howard* (1992) 1 Cal.4th 1132, 1154.)

In light of this, as the Ninth Circuit correctly observed, California courts confidently relied on the now disapproved language in *People v. Bernard, supra*, 27 Cal.App.4th at pp. 464-466, supporting application of the more demanding "strong likelihood" standard. In the present case, for example, in finding that appellant did not establish a prima facie case of group bias, the trial court stated as follows: "there's not been shown a strong likelihood that the exercise of the peremptory challenges were based upon a group rather than an individual basis. The Court has to start from the position of a premise that the exercises of the peremptory challenges were based on constitutional grounds." This language tracks the disapproved language in *Bernard* that the "presumption a party exercising a peremptory challenge is doing so on a constitutionally firm ground. . . . should be capable of being rebutted only by *a strong showing*, not a *mere inference*." (*Id.* at p. 465, italics added.) As this formulation of the initial showing of discrimination required by *Wheeler* has been rejected, we do not believe we can employ it.

The question, then, is the meaning of the footnoted statement in *Box* that "'in California, a 'strong likelihood' means a 'reasonable inference.'" (23 Cal.4th at p. 1188, fn. 7.) We do not believe it means that California courts have always treated the two phrases as meaning the same thing, which would be as novel a proposition as the idea that "clear and convincing evidence" has always meant a "preponderance of the evidence."

Though an "inference" may be defined as "an implication" (Oxford English Dictionary (2d ed.)), the word is ordinarily used in the law to refer to "[a] conclusion reached by considering other facts and deducing a logical consequence from them," or "[t]he process by which such a conclusion is reached; [i.e.,] the process of thought by

which one moves from evidence to proof." (Black's Law Dictionary (7th ed.) An inference may be reasonably deducible from evidence even if it conflicts with another inference that may also be deducible from the same evidence. (See, e.g., *Grainger v. Antoyan* (1957) 48 Cal.2d 805, 807 ["When two or more inferences can reasonably be deduced from the facts, a reviewing court is without power to substitute its deductions for those of the trial court."]; Code Civ. Proc., § 437c, subd. (c) ["summary judgment shall not be granted by the court based on inferences reasonably deducible from the evidence, if contradicted by other inferences or evidence"].) As Witkin points out, "the party's proof need not wholly exclude all unfavorable inferences; i.e., the party is not required to show that, under the circumstances, the inference in his or her favor is the only one that can reasonably be drawn. [Citations.]" (Witkin, Cal. Evidence (4th ed.), Presentation at Trial § 139, p. 198.)

However, while the same evidence, including circumstantial evidence, can give rise to conflicting inferences that are equally reasonable, the same evidence cannot simultaneously support "strong likelihoods" pointing in different directions. Thus, while courts in this State have disagreed about whether the initial showing of discrimination that constitutes a prima facie case under *Wheeler* is a "strong likelihood" or a "reasonable inference" (as, for example, the disagreement of *People v. Bernard, supra*, 27 Cal.App.4th at pp. 465-466, with the view expressed in *People v. Fuller, supra*, 136 Cal.App.3d at p. 423), the dispute was predicated upon the shared belief that the latter standard imposes a lesser burden than the former. Indeed, as already noted, the belief that a "strong likelihood" of group bias requires greater evidence than a "reasonable inference" of such bias was expressed by the Supreme Court more than a decade ago. (*People v. Sanders, supra*, 51 Cal.3d at p. 500-501.)

The statement in *Box* that "a 'strong likelihood' means a 'reasonable inference'" cannot be construed to mean that the phrases are synonymous (let alone that they were *always* thought to be synonymous), as that would reject longstanding judicial understandings, and require explanation. The different meaning of the statement is revealed, we think, by its obvious purpose, which was to reconcile *Wheeler* and *Batson*

after its incompatible application of *Wheeler* was called to our Supreme Court's attention by the Ninth Circuit in *Wade v. Terhune, supra*. As the Ninth Circuit stated, "[t]he United States Supreme Court has explained that the *Batson* framework was intended significantly to reduce the quantum of proof previously required of a defendant who wished to raise a claim of racial bias in the jury selection procedure. See *Georgia v. McCollum*, 505 U.S. 42, 47 . . . ." (*Wade v. Terhune, supra*, 202 F.3d at p. 1197) *Wheeler* is not consistent with the *Batson* framework unless the quantum of proof required by *Wheeler* to establish a prima facie case of group bias is no higher than that required under *Batson*. The statement in *Box* that "a 'strong likelihood' means a 'reasonable inference'" therefore must be taken to mean that, *for purposes of determining whether a party has established a prima facie case of group bias*, the words "strong likelihood," *as used in Wheeler and case law relating to the Wheeler rule*, shall henceforth be deemed to mean a "reasonable inference" (which is the opposite of saying that a "reasonable inference" shall be deemed to mean a "strong likelihood"). This was the view of *Wheeler* adopted in *People v. Fuller, supra*, and rejected in *People v. Bernard, supra*. By disapproving *Bernard*, the Supreme Court has in effect clarified its agreement with *Fuller* that a "reasonable inference" of group bias suffices to establish a prima facie case.

We note, finally, that the Ninth Circuit has indicated its unwillingness to defer to the Attorney General's different interpretation of *People v. Box, supra*, as clarifying that the "strong likelihood" and "reasonable inference" standards are now and have always been the same , and that use of the "strong likelihood" standard is therefore constitutionally permissible. In *Cooperwood v. Cambra* (9th Cir. Feb. 20, 2001) ___ F.3d ___, 01 C.D.O.S. 2723, the Ninth Circuit recently declared that "regardless of the California Supreme Court's 'clarification' [in *Box*] of the language used in *Wheeler*, we will continue to apply *Wade's* de novo review requirement whenever state courts use the 'strong likelihood' standard, as these courts are applying a lower standard of scrutiny to peremptory strikes than the federal Constitution permits." (*Id.* at p. 2724, citing *Wade v. Terhune, supra*, 202 F.3d at p. 1192.)

B.

In determining whether appellant established a reasonable inference of group bias, we do not limit our review solely to counsel's presentation at the time of the motion. This is because "other circumstances" readily apparent to the trial court might support the finding of a prima facie case even though not cited by defense counsel. (See *People v. Howard, supra,* 1 Cal.4th at p. 1155.) "[T]he trial court [should not] blind itself to everything except defense counsel's presentation." (*Ibid.*) Indeed, *Wheeler* emphasized that such rulings require trial judges to consider "all the circumstances of the case" (*Wheeler, supra*, 22 Cal.3d at p. 280) and called upon judges to exercise their powers of observation, their understanding of trial techniques and their broad judicial experience. (*Howard, supra*, 1 Cal.4th at p. 1155.)

It is for these reasons that the reviewing court is directed to consider "the entire record of voir dire" when a trial court denies a *Wheeler* motion without finding a prima facie case of group bias. "As with other findings of fact, we examine the record for evidence to support the trial court's ruling." (*Howard, supra*, 1 Cal.4th at p. 1155.) Because *Wheeler* motions call upon trial judges' personal observations, we view their rulings with considerable deference on appeal. If the record suggests grounds upon which the prosecutor might reasonably have challenged the jurors in question, we affirm. (*Ibid.*; *People v. Box, supra*, 23 Cal.4th at p. 1188.) The ruling is thus reviewed for substantial evidence. (See *People v. Alvarez* (1996) 14 Cal.4th 155, 196.)

As will be seen, the prima facie case asserted in this case rests in some measure on a comparison of the written and oral voir dire testimony of the African-Americans excused by the prosecution with that of other prospective jurors who were not excused, which appellant claims are materially indistinguishable. This requires us to consider whether and, if so, to what extent such comparisons may be used to show a prima facie case of group bias. Unfortunately, this is another area in which the application of *Wheeler* by California courts has differed somewhat from federal judicial application of *Batson*.

Relying on its earlier opinion in *People v. Johnson* (1989) 47 Cal.3d 1194, 1220-1221, which dealt with the review of reasons proffered by the prosecutor after a prima facie case had been found, the California Supreme Court has recently reiterated its rejection of "a procedure that places an 'undue emphasis on comparisons of the stated reasons for the challenged excusals with similar characteristics of nonmembers of the group who were not challenged by the prosecutor,' noting that such a comparison is one-sided and that it is not realistic to expect a trial judge to make such detailed comparisons midtrial." (*People v. Box, supra*, 23 Cal.4th at p. 1190.)

Federal courts have not been as reluctant as our Supreme Court to employ comparative analyses of voir dire testimony in order to determine whether the use of a peremptory challenge reflects racial or other forms of group bias and routinely do so. (See, e.g., *Caldwell v. Maloney* (1st Cir 1998) 159 F.3d 639, 651 [reasons given for challenge, though plausible, may raise serious question of pretext where explanation is equally applicable to juror of different race who was not stricken]; *Devose v. Norris* (8th Cir 1995) 53 F.3d 201, 203-205 [finding state's reason for excusing black jurors pretextual when several white jurors who were not struck gave similar answers].) This is particularly true in the Ninth Circuit. As a panel of that court recently observed, "[a] prosecutor's motives may be revealed as pretextual where a given exception is equally applicable to a juror of a different race who was not stricken by the exercise of a peremptory challenge. See *Caldwell v. Maloney*, 159 F.3d 639, 651 (1st Cir. 1998). 'A comparative analysis of jurors struck and those remaining is a well-established tool for exploring the possibility that facially race-neutral reasons are a pretext for discrimination.' *Turner v. Marshall*, 121 F.3d 1248, 1251 (9th Cir. 1997). Peremptory challenges cannot be lawfully exercised against potential jurors of one race unless potential jurors of another race with comparable characteristics are also challenged. See *id.*" (*McClain v. Prunty* (9th Cir 2000) 217 F.3d 1209, 1220-1221; accord, *U. S. v. Chinchilla* (9th Cir. 1989) 874 F.2d 695.)

The difference between our Supreme Court and the Ninth Circuit is not, however, as great as it first appears. For one thing, our Supreme Court has not precluded

comparative analyses by reviewing courts but has simply declared that they should not place an "*undue emphasis*" on such an analysis (*People v. Box, supra*, 23 Cal.4th at p. 1190; *People v. Turner, supra*, 8 Cal.4th at p. 169; *People v. Johnson, supra*, 47 Cal.4th at p. 1220.) Indeed, the Supreme Court has itself occasionally engaged in such analyses. For example, in *People v. Crittenden* (1994) 9 Cal.4th 83, in considering a challenge to a trial court finding that no prima facie case had been shown, the court entertained the defendant's claim that many jurors had expressed similar concerns about the death penalty as prospective African-American jurors who were excused. Instead of refusing to consider such a comparison, the *Crittenden* court rejected the appellant's argument on its own terms, "because all except one of these prospective jurors were excused (almost all by the prosecutor), and the prosecutor's failure to excuse the remaining juror must be viewed in light of the circumstance that the juror was called later in the proceedings, when the prosecutor's remaining peremptory challenges were few." (*Id.* at p. 119.) Also, in *People v. Jones* (1998) 17 Cal.4th 279, 295, the court addressed the defendant's comparative analysis claim that other prospective jurors who were not Black had expressed doubts about the death penalty but were impaneled anyway. It rejected the claim on its merits, finding sufficient evidence in the record to support the trial court's refusal to find a prima facie case.

It is also important to emphasize that the cases in which the Supreme Court cautioned against the placing of undue emphasis on the appellate use of comparison analysis (*People v. Box, supra*, 23 Cal.4th 1153; *People v. Turner, supra*, 8 Cal.4th 137; *People v. Montiel* (1993) 5 Cal.4th 877; *People v. Johnson, supra*, 47 Cal.3d 1194) were ones in which the trial court called for, received and accepted a race-neutral explanation from the attorney whose challenges were questioned. The important question in those cases was not whether a prima facie case of group bias had been established, but whether counsel's explanation was credible. The Supreme Court admonished against the excessive appellate use of comparison analysis in those cases because it related to the ultimate determination of bias and could not be squared with the deference that had to be accorded a trial court determination of the credibility of a proffered explanation. For

example, in *People v. Montiel, supra*, the prosecutor analyzed the views of challenged and unchallenged members of the venire and the trial judge made a "sincere and reasoned effort" to evaluate the nondiscriminatory justifications he offered. "In such circumstances," the Supreme Court stated, "an appellate court will not *reassess* good faith by conducting its own comparative juror analysis." (5 Cal.4th at p. 909, italics added.) A very different situation is presented, however, where, as in the matter before us, the trial judge neither received from counsel nor itself provided any racially neutral explanation but nonetheless refused to find a prima facie case of group bias. The issue here is neither the credibility of a racially neutral explanation nor the ultimate question of bias, but merely the *appearance* of such bias as would *call* for an explanation. Where reasons for a questioned challenge are not required by the trial court or offered by counsel, a reviewing court will often be unable to reasonably determine whether the *Wheeler* rule has been violated without some examination and comparison of the voir dire testimony of excluded and nonexcluded jurors. Barring *any* appellate use of such comparisons in those cases would materially compromise the ability of reviewing courts to intelligently evaluate the denial of *Wheeler/Batson* claims. In light of the importance of appellate review to a correct criminal adjudication (*Griffin v. Illinois* (1956) 351 U.S. 12, 18), inadequate state appellate review might undermine the presumption of the correctness of state court rulings indulged by federal courts in habeas corpus proceedings (28 U.S.C. § 2254(d)), and leave to the federal courts the enforcement of an important right arising not just under the United States Constitution but independently under our own Constitution. (See, *Burks v. Borg* (9th Cir. 1994) 27 F.3d 1424, 1428.)

We do not think our Supreme Court contemplates any abdication of state judicial responsibilities. *Wheeler* implicitly acknowledges that the exclusion of jurors on the basis of race "condones violations of the United States Constitution [and our own Constitution] within the very institution entrusted with its enforcement, and so invites cynicism respecting the jury's neutrality and its obligation to adhere to the law." (*Powers v. Ohio* (1991) 499 U.S. 400, 412.) In the light of this danger, judges must be vigilant and assertive. As stated in *Wheeler*, "the courts cannot be pacifists" in the "war" between

racial discrimination in jury selection and our basic concepts of a democratic society. (*People v. Wheeler, supra*, 22 Cal.3d at p. 280.) The *Wheeler* rule is meaningless unless a trial court finding that a prima facie case of racial or group bias has not been established is subject to meaningful review. Where such a finding is unexplained by the trial court or by counsel, a reviewing court must be able to examine all the relevant evidence, including a comparison of the voir dire testimony of excluded and nonexcluded jurors.

It is also necessary to remember that *People v. Howard, supra*, 1 Cal.4th 1132, 1155 states that judicial review of a defendant's attempt to establish a prima facie case is not limited to a review solely of counsel's presentation at the time of the motion in order to ensure that even if the defendant's showing is inadequate, there are no "other circumstances" which might support a finding of a prima facie case. Courts of Appeal have lamented that by relieving trial courts of the need to provide a rationale for a no prima facie case finding, and requiring appellate courts to examine the entire record in search of a justification, the Supreme Court has in effect compelled reviewing courts "to move into the realm of speculation concerning why a party 'may' have a reason to challenge a juror other than his or her membership in a cognizable group." (*People v. Trevino* (1997) 55 Cal.App.4th 396, 409.) As one court has stated, "where a defendant fails to make a prima facie case and, because of that, the prosecutor has not been called upon to state race-neutral reasons for exercising a peremptory, the appellate court, under the position taken by the California Supreme Court in *Howard*, is placed in the almost untenable position of culling from the record possible race-neutral reasons for excusal." (*People v. Walker, supra*, 64 Cal.App.4th 1062, 1069; accord, *People v. Buckley, supra*, 53 Cal.App.4th 658, 667 ["It is clearly uncomfortable for an appellate court to postulate hypothetical reasons a prosecutor might have challenged each juror."].) Needless to say, the problem created by *Howard* would be immeasurably exacerbated, and it would be irrational and unfair, if a comparison of the voir dire testimony of challenged and unchallenged members of the venire were excluded from the "other circumstances" reviewing courts have been required by the Supreme Court to examine.

For the foregoing reasons, we conclude that in a case such as this a reviewing court may examine and compare the voir dire testimony of those members of the venire excluded from the jury and those who were not, provided such evidence is not "one-sided," "highly speculative" or "unduly emphasized" (*People v. Johnson, supra*, 47 Cal.3d at pp. 1220-1221), but solid and persuasive.

With these thoughts in mind, we proceed to consider the voir dire testimony and other evidence appellant relies upon in arguing that the trial court erred in finding he did not establish a prima facie case of group bias. We preface our analysis, however, by noting that the prosecution's use of peremptory challenges removed all African-Americans from the jury, and in *People v. Sanders, supra*, 51 Cal.3d at p. 500, the Supreme Court indicated that this *alone* "may give rise to an inference of impropriety." (Accord, *U. S. v. Chinchilla, supra*, 874 F.2d 695, 698, fn. 4; *U. S. v. Thompson* (9th Cir. 1987) 827 F.2d 1254, 1256-1257; *U. S. v. Alcantar* (9th Cir. 1987) 832 F.2d 1175, 1177.)

Clodette T.

Clodette T.'s juror questionnaire revealed she was 42 years old, had been divorced for 11 years, had no children, and had lived in Richmond for 10 years. She had been employed in an administrative job at IBM for nine years, had attended some regular college and was a graduate of business college. She had served on a civil jury in a medical malpractice case, and that jury had reached a verdict. This was a positive experience for her. Question 20 asked, "Do you have a favorable, neutral, or unfavorable opinion of your African-American or black co-workers?" She responded: "Being an African-American myself, I am favorable." None of her other answers contained information that would give pause to either side.

During oral questioning, Ms. T. stated that her house had been "robbed" five or six years ago and that no arrest had been made for it. In examining Ms. T.'s questionnaire, the trial court noted that she had omitted answers to questions 57 and 58 (out of a total of 64 questions, spanning 17 pages) asking for her opinions about prosecuting attorneys and criminal defense attorneys. Ms. T. said she made a mistake in omitting answers to those questions, but did so only because she had no opinions on those topics. In the six or so

other questions asked, Ms. T. gave no answer that would provide a race-neutral reason for finding her unsuitable as a juror. Indeed, the court asked only 10 questions in all, and the prosecutor declined the court's invitation to ask follow-up questions.

No basis other than race appears for the prosecutor's peremptory challenge of Ms. T. Her name was never mentioned by counsel or the court during argument on either of the *Wheeler* motions. The fact that she left questions 57 and 58 blank cannot be credited as a valid justification in light of the fact that the same thing was done by white juror number 7 (questionnaire # 50) who also explained he had no opinions on the subject of those questions, and by white juror number 10 (questionnaire # 89).

Ms. T.'s answer to question 20 that she had a favorable opinion of African-American co-workers cannot be credited as a valid reason for the peremptory challenge. The only factor that distinguishes her from the many other jurors who gave the same answer is that she is African-American. White juror number 3 (questionnaire # 47), Hispanic/Latino juror number 6 (questionnaire # 78), and white juror number 8 (questionnaire # 10) all answered that they had favorable opinions of their African-American co-workers, and none was challenged by the prosecutor.

Sara E.

Sara E.'s questionnaire revealed that she was 36 years old, had never been married, and had lived in West Contra Costa County for 19 years. She had worked for Pacific Bell for 13 years, performing wiring for telephone service. Her car had been broken into five years before. She had served on a criminal jury in a robbery case in the early 1980's and that jury had reached a verdict. Question 63 asked a prospective juror whether filling out the questionnaire changed his or her attitude in any way about sitting as a juror in this case. She wrote: "I had no feelings one way or the other about sitting as a juror until I found out who the victim was. I am deeply saddened that it was an eighteen month old child. Based on the evidence brought forward, I will not allow my emotions to get in the way of the verdict." (Emphasis in original.)

During questioning on voir dire, the court mentioned that Ms. E. had failed to answer question 30, which asked whether she or a family member had ever been arrested.

Ms. E. responded that one of her parents had been arrested for robbery in another location over 35 years ago. As previously mentioned, Ms. E. was 36 years old. She knew nothing about how the police or district attorney had treated her parent.

Written question 40 inquired whether the fact that this case involved an allegation of murder and child abuse of an 18-month-old child would affect the juror's ability to be fair and impartial. Ms. E. wrote "don't know." The court asked how she felt about that now, and she replied that she could be fair and impartial.

Declining the court's explicit invitation to ask follow-up questions, the prosecutor immediately challenged Ms. E. At that point, defense counsel made his first *Wheeler* motion.

With regard to Sara E., the trial court cited the following factors in refusing to find a prima facie case: (1) She failed to answer question 30 on the written questionnaire regarding an arrest in the juror's family; (2) her parent had been arrested for robbery over 35 years ago; and (3) she wrote on the questionnaire that because of the child abuse facts, she didn't know if she could be fair and that she had emotions and feelings which may have caused concern.[4] The court stated: "Even through the answers tend to lean in the favor of the prosecution in the case, neither side would want a juror deciding a case based upon emotions, rather than the facts and the evidence."

Appellant contends that this explanation for the court's refusal to find a prima facie case of group bias ignores and is inconsistent with several highly relevant circumstances. He argues, first, that omitting an answer on a 17-page, 63-item questionnaire could not possibly be deemed a legally valid, race-neutral reason for

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[4] In defense of the trial court's ruling, the dissent mentions as an additional justification the fact that Sara E. answered "yes" to question 28: "Do you have any legal training or have you taken any law courses?" The same answer was given by juror number 11, who was not challenged. The trial court attached so little significance to Sara E.'s answer that it did not query her on it during voir dire, whereas juror number 11 was questioned at length about her legal training and experience (pre-law as an undergraduate; worked at law firm in high school and college).

challenging Ms. E. in light of the fact that white members of the venire who failed to answer questions served on the jury without objection from the district attorney.

The arrest of Ms. E.'s parent over 35 years ago, when Ms. E. was an infant, cannot fairly be considered a race-neutral reason for her challenge, appellant argues, because the prosecutor failed to challenge several whites who served on the jury who themselves or whose families were much more recently the subject of criminal charges. Juror number 9's brother was arrested for battery on a police officer just three years earlier. The brother of alternate juror number 1 was arrested for statutory rape seven years earlier. Finally, three other seated jurors had themselves been arrested for driving under the influence of alcohol or a related charge.

Appellant argues that the trial court mischaracterized Ms. E.'s written response "don't know" to question 40, which inquired whether there was anything about the nature of the charges that caused her to question her ability to be fair and impartial. The court characterized this answer as saying Ms. E. didn't know if she could be fair. But this discounts Ms. E.'s clarification of the ambiguity of her written answer by her oral statement to the court that she believed she could be fair and impartial.. Further, as might be expected, Ms. E. was hardly the only member of the venire to initially express an emotional reaction to child abuse charges. Answers to the questionnaire given by numerous other jurors, both female and male, also indicated abhorrence of child abuse but, like Ms. E., later orally affirmed that they could nonetheless be fair and impartial, and were not challenged by the prosecution.

Considering the record in its entirety, and giving particular weight to the considerations our Supreme Court identified as relevant in *Wheeler*,[5] we determine that

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5 With respect to the type of evidence that may be used to establish a prima facie case of group bias, the *Wheeler* court stated that the moving party "may show [1] that his opponent has struck most or all of the members of the identified group from the venire, or [2] has used a disproportionate number of his peremptories against the group. [3] He may also demonstrate that the jurors in question share only this one characteristic—their membership in the group—and that in all other respects they are as heterogeneous as the

appellant established a prima facie case that the prosecution's use of peremptory challenges to excuse Clodette T. and Sara E. reflect group bias.[6] The prosecutor struck all African-Americans on the venire; used a disproportionate number of his peremptory challenges against members of that racial group (3 out of 3 or 100% of the African-Americans, versus 9 out of 40 or 22% of the other prospective jurors);[7] completely excluded African-Americans from the jury ; failed to engage in any questioning whatsoever of any prospective African-American juror despite invitations to do so from the court, and despite a warning to the district attorney that his conduct seemed "very close" to a *Wheeler* violation. In addition, two of the three African-American members of the venire (Sara E. and Ruby L.) were peremptorily challenged immediately after the trial court completed its routine questioning. Finally, as earlier discussed, the record is bereft of any race-neutral explanation for these challenges. Nothing in the oral or written responses on voir dire of Clodette T. and Sara E., or anything else in the record, significantly differentiates them from members of the venire who served on the jury. Nor is there anything in their testimony suggesting they would be hostile to the prosecution; indeed, as the court observed, Sara E.'s answers "tend to lean in favor of the prosecution." We are, in short, unable to find any basis in the record for the trial judge's

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community as a whole. [4] Next, the showing may be supplemented when appropriate by such circumstances as the failure of his opponent to engage these same jurors in more than desultory voir dire, or to ask them any questions at all." (22 Cal.3d at pp. 280-281.)

6 A new trial is required if there was a prima facie case of a *Wheeler* violation as to *even one* of a cognizable group of prospective jurors. (*People v. Montiel, supra,* 5 Cal.4th 877, 909; *People v. Fuentes* (1991) 54 Cal.3d 707, 716, fn. 4.) Accordingly, our finding of a prima facie case as to Ms. T. and Ms. E. makes it unnecessary to review the validity of the peremptory challenge to Ruby L., the third and last potential African-American juror, who the trial court seemed to believe might be unable to fully understand the proceedings.

7 The prosecutor exercised a total of 12 peremptory challenges, defense counsel exercised 16 such challenges.

stated conclusion that "[t]he People are not exercising challenges based on group bias, rather than individual bias."

It appears to us that the court's determination that appellant failed to establish a prima facie case of group bias was based not on the existence of a persuasive race neutral explanation—because neither the district attorney nor the court produced such a reason—but on the belief that the presumption a party exercising a peremptory challenge is doing so on a constitutionally permissible ground can be rebutted only on a stronger showing of group bias than a reasonable inference. But, as we have explained, that theory, which is at the heart of the opinion in *People v. Bernard, supra*, 27 Cal.App.4th at p. 465, has been repudiated by the Supreme Court. For purposes of establishing a prima facie case of a *Wheeler* violation, an inference is "reasonable," or a likelihood "strong" if the record provides no *apparent* race-neutral reason for exercising a peremptory challenge. That is the case here.

The trial court's refusal to find a prima facie case ended the inquiry before the prosecutor would have been required to provide justification for his challenges. If the prosecutor had a reasonable race neutral explanation for peremptorily challenging these two members of the venire, it simply does not appear in the record. When, as here, no prima facie case is found and thus no explanation given, the reviewing court is left to speculate about possible explanations which, in this case, are not readily apparent. It may reasonably be inferred from the record that the district attorney excluded Clodette T. and Sara E. because of their race, as that is the only discernible difference between these members of the venire and those who served on the jury. As earlier noted, in reviewing California trial court compliance with *Wheeler*, which it treats as the functional equivalent of *Batson* (*McClain v. Prunty, supra,* 217 F.3d 1209, 1216, fn. 2; *Tolbert v. Page, supra,* 182 F.3d 677, 679 (en banc)), the Ninth Circuit has repeatedly declared that peremptory challenges "cannot be lawfully exercised against potential jurors of one race unless potential jurors of another race with comparable characteristics are also challenged." (*McClain v. Prunty, supra*, 217 F.3d at p. 1221; *Turner v. Marshall, supra,* 121 F.3d 1248, 1251, cert den. 522 U.S. 1153 (1998).) That test has not been met in this

case. By unjustifiably relieving the district attorney of the responsibility to provide a race-neutral explanation for these exclusions, the trial court abused its discretion and a new trial is therefore required. (*People v. Montiel, supra*, 5 Cal.4th at p. 909; *People v. Fuentes, supra*, 54 Cal.3d at p. 716, fn. 4.)

This might easily have been avoided. "The procedure designed in *Wheeler* to prevent racial discrimination in jury selection, and preserve public confidence in our courts, is not onerous. Ordinarily it takes but a few moments for a party who uses a peremptory challenge to explain why an objecting adversary has failed to establish a prima facie case or, if the court finds a prima facie case has been established, to provide a racially neutral explanation for the challenge if this can be done. Trial courts should not lightly relieve counsel of these important responsibilities, either by too readily accepting vague explanations (see, Colbert, *Challenging the Challenge: Thirteenth Amendment as a Prohibition Against the Racial Use of Peremptory Challenges* (1990) 76 Cornell L.Rev. 1 at pp. 97-98; Bell, *Race, Racism and American Law* (3d ed. 1992) § 5.16.4, p. 383) or, as appears to have occurred here by elevating the 'strong likelihood' standard to a level that can rarely be met by trial counsel, who are ordinarily in the difficult position of having to prove a negative, and must do so without the opportunity for preparation in advance under the considerable pressures imposed by trial proceedings." (*People v. Buckley, supra*, 53 Cal.App.4th at pp. 681-682, dis. opn. of Kline, P.J., fn. omitted.)

II.

Appellant has challenged a number of evidentiary rulings, which we will briefly address for purposes of guidance in the event of retrial. Since our purpose is only to provide guidance for the future, we do not address claims about whether objections were properly raised and preserved. Nor do we address appellant's claim that the prosecutor committed misconduct by switching theories as to the instrumentality of death, because this does not involve an evidentiary ruling. We trust this matter can be addressed in appropriate in limine motions prior to trial.

A.

The Pertinent Facts

The murder victim, 19-month-old Janika Price, and her mother Jennifer Shelton were living with appellant, his two- and three-year-old sons, and his aunt Linda Green and her son. Appellant was not Janika's father. Shelton had known appellant for six or seven months and had moved in with him, but it was not a good relationship. Appellant was physically abusive to Shelton and beat her frequently.

On February 19, 1996, appellant and Shelton argued about Janika. Shelton complained that appellant played too roughly with Janika. Appellant accused Shelton of spoiling Janika. Appellant hit Shelton in the face, kicked her in the foot, and kicked her again as she lay on the floor. When appellant left, Shelton fell asleep in the bedroom. She woke up when she heard Janika crying. The crying was unusual and sounded like Janika was hurt. A few minutes later, Shelton went into Janika's room and found her lying on her bed with her face to the wall. Shelton leaned down to kiss Janika and noticed she was pale and wheezing. Shelton asked appellant whether something was wrong with Janika. Appellant said Janika had thrown up, and he had cleaned her up and put her in bed. Shelton picked Janika up, discovered she was limp, and brought her into the living room.

Shelton called 911. In the meantime, appellant came in, picked up Janika, and gave her some water. Janika drank the water, but went limp again. Paramedic Robert Duvall arrived at 10:31 p.m., within three minutes of the 911 call. He asked what had happened, and appellant told him Janika had fallen out of her crib around 4:00 p.m. but had been fine until the 911 call. Duvall observed a bruise on her forehead that was consistent with a fall. There was light bruising and some vomit on her chest. She had no blood pressure or pulse, and her pupils were fixed and dilated. Janika had been dead for at least six minutes.

Dr. Brian Peterson, who performed the autopsy on Janika, testified that the cause of death was blunt force injuries to the chest, causing the heart to rupture. Such injury would cause death within a minute or so. There could be vomiting within this period.

Janika's body had other injuries, scars, and bruises that indicated a pattern of child abuse. According to Dr. Peterson, it would take a substantial amount of force, such as a hard punch or a sharp kick, to cause the heart to rupture. Dr. Peterson likened the amount of force to that which an unrestrained driver would suffer in an automobile collision at freeway speed. Accidentally stepping on the child would not have been sufficient to cause the fatal injury.

Detective David Krastof testified that he interviewed appellant twice at the police station on February 20, after Krastof had met with Dr. Peterson. The first interview was videotaped, but only the sound portion was recorded correctly. The second interview was fully videotaped. Both tapes were played for the jury.

In his first interview, appellant initially denied having had a fight with Shelton on the night of Janika's death, but later admitted they had an argument. Appellant said nothing about hitting Shelton. Appellant said he was putting up some posters in the children's room while Janika played with his sons. Janika threw up on her bed. Appellant cleaned her up. Shelton came in, said Janika was not breathing right, and took her into the other room. Appellant claimed he performed cardiopulmonary resuscitation (CPR) on Janika after she stopped breathing, but did so by applying only light pressure. When Krastof said appellant's story did not match reports from the pathologist, appellant asked for a lawyer. Krastof placed appellant under arrest.

A few hours later, after talking to his mother, appellant said he wanted to resume talking. In this second videotaped session, appellant admitted he had a violent fight with Shelton. He dragged Shelton by her hair into the bedroom, slapped and kicked her and then went into the kids' room to clean up. When Janika threw up, appellant cleaned her face and put her down. Shelton came in a little later, picked up Janika, and noticed she was not breathing right. Appellant looked at Janika, gave her some water, and she stopped breathing. Appellant put Janika on the table, breathed into her mouth, and hammered on her chest, twice, "pretty hard."

Krastof advised appellant his story was not consistent with the medical evidence. Appellant then said he had been chasing a rat around the kids' room. While chasing the

rat, he accidentally stepped on Janika's chest. He picked her up. She was screaming, but she seemed fine. She threw up right after he put her on the bed. Appellant insisted he did not kick Janika. Krastof insisted the evidence showed otherwise, and appellant eventually changed his story to say that he had accidentally kicked Janika in the chest when he backed up. Appellant said: "I did kick her. . . . I didn't know I kicked her until I explained myself just now, when I jumped back." Appellant said he lied initially because he did not want to be seen as a murderer. Appellant continued to insist that his kicking Janika's chest was an accident.

Detective Krastof saw some small bruise marks on Janika's forehead. He located appellant's BB gun under a boat at a residence two houses away and fired it at the arm of another officer. Krastof testified that the marks made by the BBs on the officer's arm were similar to the marks on Janika's face.

Appellant testified in his own defense. In the early evening on February 19, 1996, he and Shelton had a fight in which he grabbed her by the hair, knocked her down, and kicked her a couple of times. He admitted that he had been violent with Shelton before. After the fight he went into the children's room to put up some posters and clean it. All three children were there. As he moved the boys' bed, he saw a rat. Appellant put Janika on the bed and asked the boys to help him catch the rat that had run into the closet. He got a BB gun to shoot the rat. The boys shook the clothes, and the rat ran out. Appellant jumped back as the rat came toward him and stepped on Janika. Janika screamed, and he picked her up to console her.

Several minutes later, Shelton came into the room and said Janika was not breathing right. Appellant's aunt, Linda Green, said the same thing a few minutes later. Appellant went into the living room where Shelton told him Janika was not breathing. Appellant picked up Janika and gave her some water. Janika stopped breathing and went limp. Appellant told his aunt to call an ambulance and began doing CPR. Appellant hit Janika on the chest, trying to "jump start" her heart, as he had seen it done on television. Appellant denied ever physically abusing or intentionally hurting Janika. He also denied ever shooting her with a BB gun.

Appellant's aunt Linda testified that she had heard the fight in the bedroom, had seen appellant and the boys chasing a mouse, and had previously seen mice in the apartment. She did not hear Janika cry. She confirmed that Janika was breathing "funny," that appellant gave her some water, after which Janika went limp. Appellant tried to administer CPR and hit Janika in the chest in doing so.

To dispute the timing of events provided by defense witnesses, the prosecution offered the rebuttal testimony of appellant's next-door neighbor, Terry Davidson. He heard physical fighting and a woman scream, "[y]ou killed her," "[o]h my God, she's dead." The police arrived 15 to 20 minutes later.

To rebut appellant's claim that he would not let anything happen to his boys, the prosecution offered the testimony of Tammy Keller, the cousin of appellant's ex-wife. Keller testified that appellant walked in, uninvited, to the apartment she was sharing with appellant's ex-wife on August 27, 1993. He seemed very upset. When the ex-wife called, appellant got on the phone and became even more angry and started screaming, even though the boys were asleep. Appellant ignored Keller's request to lower his voice and instead proceeded to urinate in the sink on her dishes. The third time she asked him to lower his voice, he ripped the phone out of the wall. Appellant then went on a rampage. He picked up his son, Jay, Jr., and carried him like a football. While still holding the child, appellant threw a fish tank through a window, broke the glass coffee table, and tried to throw the television set out the window. Appellant bumped Jay's head on the door frame and on the television set. Keller tried to stop appellant from leaving with Jay, Jr., but appellant pushed past her.

B.

The Videotaped Interviews

Appellant contends the trial court erred in admitting the lay opinions of officers Krastof and Cope contained in the videotapes in which they repeatedly stated their opinions that appellant was lying. A police officer's personal opinion regarding the credibility of an interviewee generally is inadmissible either as lay testimony or as expert testimony and should have been redacted upon proper objection. (*People v. Melton*

(1988) 44 Cal.3d 713, 744; *People v. Smith* (1989) 214 Cal.App.3d 904, 915-916; *People v. Sergill* (1982) 138 Cal.App.3d 34, 40.)

C.

Impeachment of Jennifer Shelton

Defendant moved to exclude testimony by Jennifer Shelton as to his prior acts of domestic violence on her because the current trial pertained only to the death of Janika Price. He was convicted in the prior trial of battery on Jennifer Shelton based on the beating he inflicted immediately before Janika's death. The trial court, however, ruled that the evidence of prior abuse would be admissible to explain why Shelton changed her testimony between the preliminary examination and the first two trials.

Shelton testified on direct examination at the current trial as follows: Appellant had physically assaulted her about once a week during the six or seven months they lived together. When she testified at the preliminary examination, her testimony, which was supportive of appellant, was not totally truthful because she did not believe that appellant could do something that "hateful." She further testified that appellant had a "temper."

Appellant correctly contends that this evidence was inadmissible on the ground stated. Reference to Shelton's preliminary hearing testimony was inadmissible hearsay. It was not admissible under Evidence Code section 1235 as a prior inconsistent statement because there was no inconsistency. Shelton admitted in her testimony at the current trial that her preliminary hearing testimony was false. Thus, it would only have been admissible as a prior consistent statement under Evidence Code section 1236 if her credibility had been challenged, which it had not. (Evid. Code, §§ 1236, 791.) It was improper bootstrapping to introduce the otherwise inadmissible history of domestic violence for the purpose of explaining Shelton's preliminary hearing testimony which was inadmissible and irrelevant.

D.

Testimony of Tammy Keller

Appellant contends that the court erred in allowing Tammy Keller to testify on rebuttal about his trashing his ex-wife's apartment. Keller was the cousin of appellant's

ex-wife, Holly Eastman, who was the mother of appellant's two sons. She testified that she was living with Holly and her two children on August 27, 1993, when appellant came over while Holly was not there. Appellant spoke to Holly on the telephone and argued with her. After that, appellant went on a rampage. He ripped the telephone out of the wall and urinated on the dirty dishes in the kitchen sink. Appellant picked up his son and carried him under his arm. He threw a fish tank through the window, broke the glass coffee table, and tried to throw the television through the window. During the course of this, appellant accidentally bumped the child's head on the door and on the television.

The trial court ruled that Keller's testimony was admissible to impeach appellant's testimony that "Jay and Justin knew I'm not going to let nothing happen to them. Any time they with they daddy, they know they're protected." We agree with appellant that the evidence should have been excluded under Evidence Code sections 352 and 1101 in that its minor probative value was far outweighed by the prejudicial effect.

E.

The BB Gun Experiment

Appellant contends that the trial court erred in allowing officer Krastof to testify that the bruise marks on Janika's face appeared similar to the marks caused by shooting a fellow officer with a BB gun. We agree. A witness may not give expert testimony on an experiment without a showing that the witness has the necessary expertise. "The proponent of experimental evidence bears the burden of production and proof on the question whether such evidence rests on an adequate foundation." (*People v. Bonin* (1989) 47 Cal.3d 808, 847.) "Admission of such evidence depends upon proof of the following foundational items: (1) The experiment must be relevant; (2) it must have been conducted under at least substantially similar, although not necessarily absolutely identical, conditions as those of the actual occurrence; (3) the qualifications of the individual testifying concerning the experimentation must be demonstrated with some particularity; and (4) evidence of the experiment will not consume undue time, confuse the issues, or mislead the jury." (*People v. Turner, supra*, 8 Cal.4th at p. 198.)

Here, there was no showing that officer Krastof had any training, experience, or expertise regarding BB gun strike marks. Nor was there any showing of expertise to qualify him to give an opinion on whether an injury on an adult's arm resembles another injury on a child's face.

III.

DISPOSITION

The judgment is reversed.

Kline, P.J.

I concur:

Lambden, J.

People v. Johnson, No. A085450
Dissenting Opinion of Haerle, J.

For at least four different reasons, I respectfully but strongly dissent.

1. First of all, the majority apparently believes that footnote 7 in our Supreme Court's opinion in *People v. Box* (2000) 23 Cal.4th 1153, 1188 (*Box*), signals a major shift from its previous position regarding the applicable test under *People v. Wheeler* (1978) 22 Cal.3d 258 (*Wheeler*) and *Batson v. Kentucky* (1986) 476 U.S. 79 (*Batson*). I disagree; clearly, all our Supreme Court was saying by that footnote was: "these two terms mean the same thing to us and always have, so what's all the fuss about?"

That fuss was, as the majority suggests, the result of an opinion of a panel of the Court of Appeals for the Ninth Circuit, *Wade v. Terhune* (9th Cir. 2000) 202 F.3d 1190 (*Wade*). While affirming a lower court's denial of a petition for a writ of habeas corpus, *Wade* spent considerable space gratuitously suggesting that past California Supreme Court opinions had differentiated between the two standards and had, erroneously, applied only the "'strong likelihood'" standard.[1] (*Wade, supra,* 202 F.3d at pp. 1195-1198.)

The *Wade* opinion appeared in print in February 2000, after *Box*, a capital case, had been fully briefed.[2] Obviously, our Supreme Court wanted to promptly reassure the lower courts of this State that, the Ninth Circuit panel to the contrary,

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1 The extended essay offered by the Ninth Circuit panel was unnecessary to its result because it ultimately affirmed the federal district court's denial of a petition for a writ of habeas corpus. That denial and affirmance brought to an end an attack on the Contra Costa Superior Court's handling of a *Wheeler* motion set forth in detail in our decision in *People v. Buckley* (1997) 53 Cal.App.4th 658 (*Buckley*). In *Buckley*, with Presiding Justice Kline dissenting, we upheld the trial court's ruling that that appellant had not established a prima facie case that the prosecution's challenges were based on race. Our Supreme Court denied review in *Buckley* (see 53 Cal.App.4th at p. 683), and our opinion has been cited several times by other appellate courts dealing with appeals of *Wheeler* challenges. (See, *People v. Walker* (1998) 64 Cal.App.4th 1062, 1069; *People v. Trevino* (1997) 55 Cal.App..4th 396, 409-410 and *Birdine v. Hubbard* (N.D. Cal.) 2000 WL 1229112, p. 3, the latter being a post-*Wade* denial of a petition for a writ of habeas corpus sought on *Batson* grounds.)

2 Appellant's reply brief in *Box* was filed January 24, 2000.

it knew what it was doing regarding the *Wheeler/Batson* standard, and it opted to do so in both a prompt and succinct way via footnote 7 of *Box*. The majority treats this as some sort of major event. This is plainly incorrect. Indeed, the Court specifically noted in that footnote (as, also, had the Ninth Circuit panel in *Wade*) that even as early as *Wheeler* (which, of course, preceded the United States Supreme Court's *Batson* decision by eight years), *both* terms were used synonymously within a page of one another. (See *Wheeler*, *supra*, 22 Cal.3d at pp. 280-281; *Wade, supra,* 202 F.3d at p. 1196.)

The long and short of all this is that, the majority of this court and *Wade* to the contrary, our Supreme Court has been using the *Batson* standard all along, and footnote 7 in *Box* did not signal any change on that issue. Additional proof of that fact came in an opinion authored by Justice Mosk and filed a few days after *Box*. (*People v. Ayala* (2000) 24 Cal.4th 243, 260.) As the majority points out in its footnote 3, in the course of that decision the Court quoted from *Box* and, in so doing, put the term "reasonable inference" in brackets after the term "strong likelihood." I don't know how that Court could have signaled more emphatically that, in its view, the two terms do now, and always have, meant the same thing.

The majority, however, is obviously not persuaded. Relying upon various and sundry dictionary definitions of the relevant terms and, even more importantly, repeated citations to federal, especially Ninth Circuit, authority, the majority contends, at least as I understand matters, that both the *Box* footnote and the bracketed phrase in *Ayala* are substantially inexplicable.[3]

I remind my colleagues in the majority that, their strong and honest feelings notwithstanding, we are an intermediate appellate court that is bound to follow the rulings of our Supreme Court, even those we feel are not adequately explained. Thus, and

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3 The majority also contends that, previously, the Court differentiated between the concepts of "strong likelihood" and "reasonable inference." It argues that in *People v. Sanders* (1990) 51 Cal.3d 471, 500-501 (*Sanders*), the Court expressed "the belief that a 'strong likelihood' of group bias requires greater evidence than a 'reasonable inference' of such bias. . . ." (Maj. opn. at p. 9.) This is simply incorrect. The Supreme Court said no such thing and, indeed, the term "reasonable inference" nowhere appears in the cited pages of *Sanders*.

because I have no difficulty understanding the (admittedly cursory) *Box* footnote, I think the majority errs in not following its clear direction.

2. Most unfortunately in my view, the majority opinion gives only lip service to the principle that an appellate court should pay deference to a trial court's ruling on a *Wheeler/Batson* motion. The majority briefly alludes to this principle (maj. opn. at p. 11), but immediately thereafter proceeds to pay no deference whatsoever to the trial court's ruling.

And it is not as if the direction to pay such deference has been vague: our Supreme Court has repeated it practically every time a *Wheeler* issue has been before it—which is a lot of times. Indeed, in the important case of *People v. Johnson* (1989) 47 Cal.3d 1194, 1221 (*Johnson*), where the Court disapproved of an earlier effort to modify the *Wheeler* standard (*People v. Trevino* (1985) 39 Cal.3d 667), the standard was articulated as one of "truly giving great deference" to the trial court. (*Johnson*, *supra*, 47 Cal.3d at p. 1221.) Most recently, in *People v. Jones* (1998) 17 Cal.4th 279, 294, the Court stressed that ""'[b]ecause *Wheeler* motions call upon trial judges' personal observations, we view their rulings with "considerable deference" on appeal.'"" To the same effect are the Court's holdings in *People v. Howard* (1992) 1 Cal.4th 1132, 1155, *People v. Crittenden* (1994) 9 Cal.4th 83, 117, and *People v. Mayfield* (1997) 14 Cal.4th 668, 723. Even the United States Supreme Court, in its *Batson* opinion, pointedly acknowledged this principle. It said: "Since the trial judge's findings in the context under consideration here largely will turn on evaluation of credibility, a reviewing court ordinarily should give those findings great deference." (*Batson, supra,* 476 U.S. at p. 98, fn. 21.)

Our Supreme Court elaborated on this rationale for the required deference in *Sanders, supra,* 51 Cal.3d 471: "We reiterate that ruling on *Wheeler* motions "'requires trial judges to make difficult and often close judgments. They are in a good position to make such determinations, however, on the basis of their knowledge of local conditions and of local prosecutors." [Citation.] They are also well situated to bring to bear on this question their powers of observation, their understanding of trial techniques, and their broad judicial experience. We are confident of their ability to distinguish a true case of

group discrimination by peremptory challenges from a spurious claim . . . .' (*Wheeler, supra*, 22 Cal.3d at p. 281, quoting Kuhn, Jury Discrimination: The Next Phase (1968) 41 So.Cal.L.Rev. 235, 295, fn. 5; see also *Johnson, supra*, 47 Cal.3d at pp. 1219-1222.) Applying this standard of giving considerable deference to the determination of the trial court, 'we see no good reason to second-guess [the trial court's] factual determination' (*Johnson, supra,* at p. 1221) that the prosecutor was not motivated by bias against Hispanics." (*Sanders, supra,* 51 Cal.3d at p. 501.)

So, how much deference does the majority pay to this trial court's "powers of observation" which necessarily impact its "evaluation of credibility," its "understanding of trial techniques," or its "broad judicial experience"? The answer is disturbing: aside from a single mention of the word "deference" (maj. opn. at p. 11), none at all. Thus, the majority (1) totally avoids the trial court's careful statement of its reasons for concluding that no prima facie case of discrimination was shown by the prosecution's peremptory challenge of prospective juror Ruby L. (maj. opn. at p. 20, fn. 6) and (2) totally reevaluates, as if it were the trial court itself, the validity of that court's reasons for coming to the same conclusion regarding prospective juror Sara E. (maj. opn. at pp. 17-20).

The apogee of the majority's second-guessing of the trial court regarding that potential juror concerns that court's verbal inquiry as to whether, in light of Sara E.'s ambiguous answer to a questionnaire inquiry, she could be fair and impartial. The majority says that the trial court "discount[ed] Ms. E.'s clarification of the ambiguity of her written answer by her oral statement to the court that she believed she could be fair and impartial." (Maj. opn. at p. 19.) But it was *the trial court and not the majority* that saw and heard the answer from Ms. E. to its question and, therefore, *it is for that court and not us* to evaluate what weight, if any, to give to that answer. That is what the United States Supreme Court had in mind when it noted the ability of trial courts to "evaluat[e] . . . credibility" (*Batson, supra,* 476 U.S. at p. 98, fn. 21) and what our Supreme Court meant when it observed that trial courts have necessarily unique "'powers of

observation.'" (*Sanders, supra,* 51 Cal.3d at p. 501, quoting *Wheeler, supra,* 22 Cal.3d at p. 281.)

3. Having substantially disregarded the principle of deference, the majority compounds its error by then indulging in a multitude of comparisons of the questionnaire answers of two of the three challenged jurors to those of prospective jurors of other races.

To its credit, the majority appreciates that it is navigating in, as far as California is concerned, uncharted water. It recognizes that appellant's challenge "rests in some measure [I would have said 'almost entirely'] on a comparison of the written and oral voir dire testimony of the African-Americans excused by the prosecution with that of other prospective jurors who were not excused, which appellant claims are indistinguishable. This requires us to consider whether and, if so, to what extent such comparisons may be used to show a prima facie case of group bias. Unfortunately, this is another area in which the application of *Wheeler* by the California courts has differed somewhat from federal judicial application of *Batson.*" (Maj. opn. at p. 11.) The majority then goes on to indicate, once again, its clear preference for the federal approach, especially that espoused by the Ninth Circuit.

There is, the majority's implication to the contrary, nothing ambiguous about our Supreme Court's view of such comparative analyses. It has repeatedly admonished that such comparisons should not be undertaken by an appellate court. For example, in *People v. Turner* (1994) 8 Cal.4th 137, in rejecting an appellant's challenge to a trial court finding of no prima facie case of discrimination, the Court said: "Defendant argues, however, that this basis was insufficient here because the prosecutor did not excuse other non-Black jurors who displayed similar intellectual limitations. However, we have previously rejected a procedure that places an 'undue emphasis on comparisons of the stated reasons for the challenged excusals with similar characteristics of nonmembers of the group who were not challenged by the prosecutor,' noting that such a comparison is one-sided and that it is not realistic to expect a trial judge to make such detailed comparisons midtrial. [Citation.] [¶] . . . Moreover, 'the very dynamics of the jury selection process make it difficult, if not impossible, on a cold record, to evaluate or

compare the peremptory challenge of one juror with the retention of another juror [who] on paper appears to be substantially similar.'" (*Id.* at pp. 169-170.) More recently, the Court said precisely the same thing in *Box* (*supra,* 23 Cal.4th at p. 1190), also in the context of a prima facie ruling. (See also *People v. Fuentes* (1991) 54 Cal.3d 707, 715.)

The majority tries to avoid this rule by three patently fallacious devices. First of all, it interprets the "undue emphasis" phrase in the quoted passage from *Turner* as an invitation to put its foot in that door and try to open it further. In so doing, it carefully avoids discussing language in Supreme Court cases that make clear that the prohibition is *absolute*. Thus, in *People v. Montiel* (1993) 5 Cal.4th 877 (*Montiel*), the Court stated: "If the trial court makes a 'sincere and reasoned effort' to evaluate the nondiscriminatory justifications offered, its conclusions are entitled to deference on appeal. *In such circumstances, an appellate court will not reassess good faith by conducting its own comparative juror analysis.* Such an approach would undermine the trial court's credibility determinations and would discount '"'the variety of [subjective] factors and considerations,"' including 'prospective jurors' body language or manner of answering questions,' which legitimately inform a trial lawyer's decision to exercise peremptory challenges." (*Id.* at p. 909, italics added.)

Quoting this passage, the Court said even more recently: "Just as an appellate court *will not* compare the responses of rejected and accepted jurors to determine the bona fides of the justifications offered, so the trial court itself has no obligation to perform such an analysis. '[W]e fail to see how a trial judge can reasonably be expected to make such detailed comparisons mid-trial.' [Citation.] Moreover, as we have indicated, such an analysis is largely beside the point, because it ignores the legitimate subjective concerns 'that go into a lawyer's decision to select certain jurors while challenging others that appear to be similar [on the cold record].' [Citation.]" (*People v. Arias* (1996) 13 Cal.4th 92, 136, fn. 16 (*Arias*), italics added.)

I suggest that two recent doses of "will not" from our Supreme Court cannot, the majority to the contrary, translate into "may."[4]

Second, the majority argues that our Supreme Court's concern about comparative analyses obtains only in those cases where the prosecutor was either asked for or volunteered explanations concerning the questioned challenges, but does not apply in cases, such as this, where no such explanation was asked for or given. But there is absolutely no language in any of the cases cited by the majority even implying any such distinction. Indeed, several of the more recent cases containing the admonition against appellate courts engaging in comparative analyses were cases in which the trial court had ruled that no prima facie case had been established. (*Box, supra,* 23 Cal.4th at p. 1190; *People v. Turner, supra,* 8 Cal.4th at pp. 169-170.) Indeed, the only case relied upon by the majority where the admonition against comparative analyses *did not* arise in the context of a challenge regarding a prima facie case was *Johnson, supra,* 47 Cal.3d at page 1220.[5] This fact, plus the unequivocal statements in *Montiel* and *Arias*, combine

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4 The majority carefully avoids discussing the "will not" language in *Montiel* and *Arias*, and doesn't even cite the latter case. It demonstrates its inattention (to be generous) to the language used in them by saying that "our Supreme Court has not precluded comparative analyses by reviewing courts but has simply declared that they should not place an '*undue emphasis*' on such an analysis." (Maj. opn. at pp. 12-13; italics the majority's.) The majority to the contrary, I think the phrase "will not" is a pretty good hint of an intent to "preclude."

5 Both *Montiel* and *Arias* are unclear regarding the precise procedural context of their rulings. In *Montiel*, the trial court asked the prosecutor for his reasons without indicating one way or the other if it felt the defense had made a prima facie showing. (*Montiel, supra,* 5 Cal.4th at pp. 907-910.) However, the Court hinted that, in such circumstances, it might infer a finding of a prima facie case (*id.* at p. 910, fn. 8). In *Arias*, there was no such inference because the trial court indicated it has "questions" about the defense's prima facie showing (indeed, the Court itself had doubts if such had been shown); nonetheless, the prosecutor was asked for and gave his explanations. (*Arias, supra,* 13 Cal.4th at pp. 133-139.)

to demolish the distinction so laboriously constructed by the majority.

Third, the majority suggests that perhaps our Supreme Court doesn't really mean what it says regarding comparative analyses because, in two decisions, the Court itself indulged in comparisons. The majority is flatly wrong. The passage from *People v. Crittenden, supra,* 9 Cal.4th at page 119, which the majority contends reveals an inconsistency in the Court's application of this rule (maj. opn. at p. 13) does no such thing. As a simple reading of it demonstrates, the Court was simply noting that Crittenden's "comparison" argument was not even worth debating because (1) all but one of the non-African American prospective jurors who expressed doubt about the death penalty were also excused by the prosecution and (2) the only one who wasn't was called "later in the proceedings, when the prosecutor's remaining challenges were few."[6]

The majority also suggests that a few sentences in *People v. Jones, supra,* 17 Cal.4th at page 295, demonstrates that the Court endorses comparative analyses. (Maj. opn. at p. 13.) It is, I believe, constructive to quote the two sentences the majority relies upon: "The implication [of the defendant's argument] is that the Black prospective jurors were singled out for special scrutiny. On this record, however, we are constrained to disagree. There is evidence to support the court's rulings on the four Black prospective jurors in question, enough to reject the defendant's claims of *Wheeler* error." (*Id.* at p. 295.)

I simply do not understand how the majority can conclude from these three plain vanilla sentences that, contrary to its repeated and emphatic words in many other decisions, our Supreme Court in fact approves of comparative analyses of the handling of prospective jurors. Since its emphatic disapproval of the comparative analysis system espoused (and indeed undertaken) by the majority in *People v. Trevino, supra,* 39 Cal.3d 667 (see *Johnson, supra,* 47 Cal.3d at pp. 1220-1221), our Supreme Court's position has

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6 In fact, in *People v. Johnson, supra,* 47 Cal.3d at p. 1220, the Court specifically noted, by way of support for its anti-comparison stance, that "the same factors used in evaluating a juror may be given different weight depending on the number of peremptory challenges the lawyer has at the time of the exercise of the particular challenge . . . ." *Crittenden*, in the passage quoted by the majority, was simply adopting this *additional reason for avoiding comparative analyses*.

been unwaveringly negative on that subject. I hope very much that the majority in this case is not suggesting that we should return to the *Trevino* era of wholesale appellate adjudication on this subject. That is, nonetheless, the effect of its opinion. For that reason, if no other, I strongly urge the Supreme Court to grant review of the majority's decision.

4. Finally, I submit that the record before us contains ample justification for the trial court's ruling that no prima facie case had been established. It will be recalled that the ultimate ruling by the trial court under review here was as to the second defense *Wheeler* motion. That motion encompassed the prosecutor's peremptory challenges to three African-American jurors, Ruby L., Sara E., and Clodette T. The trial court made specific comments on the record regarding the apparent justifications for the challenges to the first two, Ruby L. and Sara E.. It made no specific comment regarding Clodette T.

The majority takes these three in reverse order. As far as Ruby L. is concerned, it seems to believe that the trial court's ruling regarding her is almost irrelevant. It buries its only reference to that ruling in a footnote 20 pages into its opinion (maj. opn. at p. 20, fn. 6), even though appellant specifically made it a part of his appeal. The majority simply says that, as to this prospective juror, "the trial court seemed to believe [she] might be unable to fully understand the proceedings." (maj. opn. at p. 20, fn. 6.) A slight understatement, I suggest; the trial court not only "seemed to believe" this, it clearly did and it was clearly right.

In addressing the challenge to this juror, which precipitated the second *Wheeler* motion, the trial court noted, among other things, that (1) "the Court had concerns with regard to her qualifications in this matter based upon her answers to the questionnaire," (2) Ruby L. had a sister who "had had drug charges," (3) "she herself felt that she had difficulty understanding things", and (4) her "answers on the questionnaire . . . would have justified a peremptory challenge by either side . . . ."[7]

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7 The trial court was obviously referring to Ruby L.'s answers to such questions as 37(c), 38-40, and 61. In these, she admitted that, e.g., she could not follow instructions to judge the credibility of all witnesses, including peace officers, by the same standards, could only commit to "try" to follow CALJIC No. 1.00 "regardless of the

In short, Ruby L. was a hopeless prospective juror from the prosecution's standpoint, and the trial court was clearly correct in ruling that its challenge of her neither raised nor contributed to the raising of a prima facie *Wheeler* issue. But the majority omits all this and, in so doing, does a grave injustice to the trial court. We are, after all, reviewing *the entirety* of its ruling on the *Wheeler/Batson* issue. Put another way, the issue before us is, was the trial court correct in finding, *as to these three African-American jurors*, that no prima facie violation of *Wheeler* had been shown? But, apparently, because the record as to one of those three so clearly supports the trial court's ruling and, conversely, undermines the majority's position, that portion is consigned to the near-oblivion of a footnote and, even there, half-heartedly explained. I think this is quite inappropriate. Appellate courts regularly give parties to appeals before them a hard time when they cite only the favorable-to-them parts of the record. We should pay a trial court at least the respect of reciting the *full and complete basis* of its ruling before reversing it.

As to the remaining two prospective jurors, the majority paints with a broad brush by proclaiming that "the record is bereft of any race-neutral explanation for these challenges." (Maj. opn. at p. 21.) The majority's own opinion shows that this is utterly wrong; most of the preceding four pages of its opinion are devoted to quarreling with the trial court over the proper weight to be placed upon and interpretation given to (1) Sara E.'s failure to answer question 30 regarding whether either she or a family member had ever been arrested, (2) the fact that one of her parents had, in fact, been arrested for robbery, (3) her "don't know" answer to a written question as to whether the fact that the case involved allegations of murder of a minor and child abuse would affect her ability to be fair and impartial.

But the strongest basis for the peremptory challenge to Sara E. came from her reluctant responses to the trial court's questioning of her regarding her failure to answer question 30 on the questionnaire. That revealing dialogue went like this:

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consequences," and was not sure that she could be fair, given the nature of the charges and circumstances of the

"THE COURT: . . . You or anybody close to you ever been arrested?

"MS. E.: I can answer that.

"THE COURT: Was it you or someone else?

"Ms. E.: Someone else.

"THE COURT: How is that person related to you?

"Ms. E.: Parent.

"THE COURT: What was the person arrested for?

"Ms. E. I believe it was robbery.

"THE COURT: Was that in this county or someplace else?

"Ms. E.: Someplace else.

"THE COURT: And how long ago are we talking about?

"Ms. E.: Over thirty-five years ago."

In short, it took *six* questions from the trial court to elicit a full and complete answer to question 30 on the questionnaire. I respectfully suggest that, after that series of questions and answers, any prosecutor who opted to leave Sara E. "in the box" ought to consider a different career.

Also present in the record, although not cited by the trial court,[8] is the fact that Sara E. had had "legal training," clearly a "race-neutral" reason for rejecting a prospective juror. (See *People v. Crittenden, supra,* 9 Cal.4th at p. 119.) Additionally, and as noted by the majority, she stated in answer to one of the written questions that, although she would "not allow my emotions to get in the way of the verdict," she was "deeply saddened that [the victim in the case] was an eighteen month old child." I suggest that clearly there were more than ample reasons for the prosecution to peremptorily challenge Sara E. and that, by so doing, it did not raise a prima facie case of race discrimination.

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case.

8 We are, of course, permitted to review the record for "' grounds upon which the prosecutor might reasonably have challenged' the jurors in question." (*People v. Howard, supra,* 1 Cal.4th at p. 1155; see also our opinion in *Buckley, supra,* 53 Cal.App.4th at p. 667.)

Which leaves only Clodette T. As noted both above and by the majority, the trial court made no mention of its views regarding her in its ruling that no prima facie case had been shown. But a review of the record discloses, again as noted by the majority, that (1) she was childless (this case involved the death and alleged abuse of a minor),[9] (2) the police had made no arrest after the robbery of her home five or six years ago, and (3) she omitted to answer the two questions in the questionnaire dealing with her opinions of prosecuting and defending attorneys.

I submit that, giving the required deference to the trial court, it could reasonably have found that, considered together with the ample justifications in the record for the challenges to Ruby L. and Sara E., the challenge to Clodette T. did not, either alone or in combination with the others, present a prima facie case of a violation of *Wheeler.*

Haerle, J.

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9 A Ninth Circuit case the majority omits from its encomiums to that court says that "lack of family may have appeared relevant to the prosecutor in a case involving child abuse and reasonably could be deemed to constitute a non-discriminatory basis for striking the venireman." (*U.S. v. Lewis* (9th Cir. 1988) 837 F.2d. 415, 417, cert. den. Lewis v. United States (1988) 488 U.S. 923.)

Trial Court: Contra Costa County Superior Court

Trial Judge: Honorable Patricia Sepulveda

Attorneys for Appellant:

Stephen B. Bedrick
1970 Broadway, Ste. 1200
Oakland, CA 94612

Attorneys for Respondent:

Bill Lockyer, Attorney General
David P. Druliner, Chief Assistant Attorney General
Ronald A. Bass, Senior Assistant Attorney General
Martin S. Kaye, Deputy Attorney General
Richard Rochman, Deputy Attorney General
455 Golden Gate Ave., Ste. 11000
San Francisco, CA 94102

APPENDIX B

[No. S097600. June 30, 2003.]

THE PEOPLE, Plaintiff and Respondent, v.
JAY SHAWN JOHNSON, Defendant and Appellant.

SUMMARY

A jury found defendant, an African-American man, guilty of the second degree murder of the 19-month-old daughter of his White girlfriend and of assault resulting in the death of a child under the age of eight (Pen. Code, §§ 187, 273ab). During jury selection, the prosecutor exercised 12 peremptory challenges, using three of them to challenge all three African-American prospective jurors on the jury panel. Defendant moved to require the prosecutor to justify the challenges by showing they were not the result of bias. The trial court denied the motion in a detailed ruling. (Superior Court of Contra Costa County, No. 96-0691-4, Patricia K. Sepulveda, Judge.) The Court of Appeal, First Dist., Div. Two, No. A085450, reversed.

The Supreme Court reversed the judgment of the Court of Appeal and remanded for further proceedings. The court held that defendant failed to establish a prima facie case that the prosecutor used his peremptory challenges improperly. When a defendant seeks to establish a prima facie case of discriminatory use of peremptory challenges, California law uses two terms—"strong likelihood" and "reasonable inference"—to describe the necessary showing of group bias before the prosecution must explain its challenges. Although federal law uses the single term, "an inference of discriminatory purpose," the terms, a "strong likelihood" and a "reasonable inference," refer to the same test, and this test is consistent with the federal test. The court also held that the practice of comparing, for the first time on appeal, the answers of excused jurors with those of jurors not excused to determine whether the trial court erred in denying an objection to the prosecution's use of peremptory challenges, is unreliable, fails to give due deference to the trial court's ruling, and is not required under federal law. In this case, the trial court was in the best position to make the determination. (Opinion by Chin, J., with George, C. J., Baxter, Brown, and Moreno, JJ., concurring. Concurring and dissenting opinion by Werdegar, J. (see p. 1328). Dissenting opinion by Kennard, J. (see p. 1329).)

HEADNOTES

Classified to California Digest of Official Reports

(1a-1c) Jury § 47.6—Challenges—Peremptory—Group Bias—Prima Facie Case—Necessary Showing.—When a criminal defendant seeks to establish a prima facie case of discriminatory use of peremptory challenges to prospective jurors, California law uses two terms—"strong likelihood" and "reasonable inference"—to describe the necessary showing of group bias before the prosecution must explain its challenges. Although federal law uses the single term, "an inference of discriminatory purpose," the terms, a "strong likelihood" and a "reasonable inference," refer to the same test, and this test is consistent with the federal test. Under both tests, to state a prima facie case, the objector must show that it is more likely than not the other party's peremptory challenges, if unexplained, were based on impermissible group bias. Thus, California's standard for establishing a prima facie case of discriminatory use of peremptory challenges is, and always has been, compatible with federal law. It merely means that to state a prima facie case, the objector must show that it is more likely than not the other party's peremptory challenges, if unexplained, were based on impermissible group bias.

[See 5 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Criminal Trial, § 495 et seq.; West's Key Number Digest, Jury ⇐ 33(5.15).]

(2a-2d) Jury § 47.9—Challenges—Peremptory—Group Bias—Prima Facie Case—Appellate Review—Comparative Juror Analysis.—The practice of comparing, for the first time on appeal, the answers of excused jurors with those of jurors not excused to determine whether the trial court erred in denying an objection to the prosecution's use of peremptory challenges, is unreliable and fails to give due deference to the trial court's ruling. This rule against comparative juror analysis for the first time on appeal does not violate any requirement of federal constitutional law. However, the rule has never prohibited trial courts from doing so or the party objecting to the challenges from relying on such analysis in seeking to make a prima facie case. When the objecting party presents comparative juror analysis to the trial court, the reviewing court must consider that evidence, along with everything else of relevance, in reviewing, deferentially, the trial court's ruling. When such an analysis was not presented at trial, a reviewing court should not attempt its own comparative juror analysis for the first time on appeal, especially when the record supports the trial court's finding of no prima facie case. While the practice is not prohibited outright, comparative

juror analysis for the first time on appeal would very rarely be fruitful or appropriate.

(3) **Jury § 47.9—Challenges—Peremptory—Group Bias.**—Exercising peremptory challenges because of group bias rather than for reasons specific to the challenged prospective juror violates both the California Constitution and the United States Constitution.

(4) **Jury § 47.9—Challenges—Peremptory—Group Bias—Prima Facie Case—Appellate Review—Comparative Juror Analysis—Rule of Deference.**—If the trial court makes a sincere and reasoned effort to evaluate the nondiscriminatory justifications offered for peremptory challenges, its conclusions are entitled to deference on appeal. In such circumstances, an appellate court will not reassess good faith by conducting its own comparative juror analysis. Such an approach would undermine the trial court's determinations of credibility and would discount the variety of subjective factors and considerations, including prospective jurors' body language or manner of answering questions, which legitimately inform a trial lawyer's decision to exercise peremptory challenges. The concerns about the inability of a reviewing court to judge the dynamics of jury selection on a cold record also apply when the trial court determines whether the objector has established a prima facie case to begin with.

(5) **Jury § 47.7—Challenges—Peremptory—Group Bias—Prima Facie Case.**—The trial court did not err in denying the motion of an African-American man, charged with the murder and assault resulting in death of his White girlfriend's baby, to require the prosecutor to justify his peremptory challenges of all three African-American prospective jurors on the panel. The record suggested grounds for the prosecutor to have reasonably challenged the jurors. The trial judge, who had performed much of, and observed the remainder of, the voir dire, and thus was in the best position to determine under all the relevant circumstances of the case whether a prima facie showing existed, mentioned reasons as to two of the jurors. The court noted that these reasons did not warrant a challenge for cause, but peremptory challenges need not be based on grounds for a challenge for cause. Although the trial court did not specifically discuss the third of the challenged jurors, at trial, defendant did not argue that no reason existed to challenge that juror. That all three African-American prospective jurors were removed was obviously highly relevant to whether a prima facie case existed, and the trial court gave it careful scrutiny, considered the question close, but found no prima facie case under all the circumstances. It would not be

appropriate to second-guess its determination by attempting a comparative juror analysis for the first time on appeal.

(6) **Jury § 47.7—Challenges—Peremptory—Group Bias—Prima Facie Case—Failure to Question Jurors.**—In considering the motion of an African-American man, charged with the murder and assault resulting in death of his White girlfriend's baby, to require the prosecutor to justify his peremptory challenges of all three African-American prospective jurors on the panel, the fact that the district attorney asked no questions of the African-American jurors he challenged was of little or no significance. At the time, the trial court had primary responsibility for conducting voir dire, and the district attorney also asked no questions of any prospective juror, including the nine of other ethnic groups he also challenged.

COUNSEL

Stephen B. Bedrick, under appointment by the Supreme Court, for Defendant and Appellant.

Bradley A. Bristow for California Public Defenders Association as Amicus Curiae on behalf of Defendant and Appellant.

Lynne S. Coffin, State Public Defender, Raoul D. Schonemann, Deputy State Public Defender; and Alan L. Schlosser for Office of the State Public Defender and American Civil Liberties Union of Northern California as Amici Curiae on behalf of Defendant and Appellant.

Bill Lockyer, Attorney General, David P. Druliner and Robert R. Anderson, Chief Assistant Attorneys General, Ronald A. Bass and Gerald A. Engler, Assistant Attorneys General, Martin S. Kaye, Richard Rochman, Ronald S. Matthias, Catherine A. McBrien, Laurence K. Sullivan and Seth K. Schalit, Deputy Attorneys General, for Plaintiff and Respondent.

OPINION

CHIN, J.—During jury selection, each party is entitled to a limited number of peremptory challenges. (Code Civ. Proc., § 231.) However, exercising peremptory challenges to remove prospective jurors solely because of group bias, for example, on racial grounds, violates both the California Constitution (*People v. Wheeler* (1978) 22 Cal.3d 258 [148 Cal.Rptr. 890, 583 P.2d

748] (*Wheeler*)) and the United States Constitution (*Batson v. Kentucky* (1986) 476 U.S. 79 [106 S.Ct. 1712, 90 L.Ed.2d 69] (*Batson*)). Both *Wheeler* and, later, *Batson* established procedures for courts to follow when one party objects to the other party's peremptory challenges. Defendant contends that California's procedures violate *Batson* in two respects.

(1a) First, although both *Wheeler* and *Batson* require the objector to establish a prima facie case of discriminatory use of peremptory challenges before the other party must explain its challenges, *Wheeler* used two terms—"strong likelihood" and "reasonable inference"—to describe the necessary showing of group bias; *Batson* used the single term, "an inference of discriminatory purpose." (*Batson*, *supra*, 476 U.S. at p. 94 [106 S.Ct. at p. 1721]; *Wheeler*, *supra*, 22 Cal.3d at pp. 280-281.) Defendant argues that the "strong likelihood" standard states a different, and higher, requirement for establishing a prima facie case than *Batson* permits.

(2a) Second, we have observed that comparing, for the first time on appeal, the answers of excused jurors with those of jurors not excused to determine whether the trial court erred in denying an objection to the use of peremptory challenges is unreliable and fails to give due deference to the trial court's ruling. (E.g., *People v. Box* (2000) 23 Cal.4th 1153, 1190 [99 Cal.Rptr.2d 69, 5 P.3d 130]; *People v. Montiel* (1993) 5 Cal.4th 877, 909 [21 Cal.Rptr.2d 705, 855 P.2d 1277]; *People v. Johnson* (1989) 47 Cal.3d 1194, 1220-1222 [255 Cal.Rptr. 569, 767 P.2d 1047].) Defendant contends that this rule against "comparative juror analysis" violates *Batson*.

(1b) We conclude that *Wheeler*'s terms, a "strong likelihood" and a "reasonable inference," refer to the same test, and this test is consistent with *Batson*. Under both *Wheeler* and *Batson*, to state a prima facie case, the objector must show that it is more likely than not the other party's peremptory challenges, if unexplained, were based on impermissible group bias. **(2b)** We also conclude that *Batson* does not require state reviewing courts to engage in comparative juror analysis for the first time on appeal. Finally, applying California's procedures, which satisfy *Batson*, to this case, we uphold the trial court's finding that defendant failed to establish a prima facie case that the prosecutor used his peremptory challenges improperly.

Accordingly, we reverse the judgment of the Court of Appeal, which reached contrary conclusions.

I. FACTS AND PROCEDURAL HISTORY

A jury found defendant guilty of the second degree murder of the 19-month-old daughter of his girlfriend and of assault resulting in the death of a child under the age of eight. (Pen. Code, §§ 187, 273ab.) The issues before us solely involve jury selection, so we focus on that process.

The district attorney exercised 12 peremptory challenges. He used three of them to challenge all three African-American prospective jurors on the jury panel—C.T., S.E., and R.L. After the second of these challenges, defendant made a "*Wheeler* motion." (*Wheeler*, *supra*, 22 Cal.3d 258.) He stated that his motion, "[m]ore specifically . . . concerns [S.E.], the last individual who was eliminated by the People." He argued the prosecutor had no apparent reason to challenge this prospective juror "other than [her] racial identity." He made no argument regarding C.T. The court responded that, "based on the record that's been made, [it] would find that there's not been shown a strong likelihood that the exercise of the peremptory challenges were based upon a group rather than an individual basis. The Court has to start from the position of a premise that the exercises of the peremptory challenges were based on constitutional grounds." The court also told the district attorney, however, that "we are very close."

After the third of these challenges, defendant renewed his *Wheeler* motion. Focusing this time on the most recent challenge, he based his motion on the circumstance that the district attorney had removed all of the African-American prospective jurors. The court denied the motion in a detailed ruling. Regarding the most recent challenge, the court stated that it had had "concerns with regard to her qualifications in this matter based upon her answers on the questionnaire; specifically, the Court had noted that she had a sister who had had drug charges, although her answers in follow-up verbally were such that the Court would not have found that the issues were such to lead to a challenge for cause. May be sufficient to justify a peremptory challenge by the People. [¶] Also, with regard to her answers generally on the questionnaire itself, there was an indication that she had difficulty understanding some of the issues, and specifically, her last response which was somewhat rambling on the questionnaire indicated that she herself felt that she had difficulty understanding things. Again, her verbal responses here in court were such that I would not have granted a challenge for cause on that basis, but the Court felt that the answers on the questionnaire were sufficient that they certainly would have justified a peremptory challenge by either side, frankly, based upon the concerns about her ability to understand the proceedings."

The court noted the rest of the district attorney's challenges were against "all other types of groups, including white women and white men as well." Regarding S.E., the court stated that it had been concerned about her, "including the answer on question thirty that she gave verbally here in court

that she had not included in her questionnaire; a parent had a robbery or arrest, even though that was a number of years ago, thirty years ago. Her answers on the record were not as such that I would have granted a challenge for cause. Certainly, they could justify a challenge by the People. [¶] She expressed on the record that she didn't know if she could be fair. Her verbal follow-up responses were not such that I would have granted a challenge for cause. And also based upon the answers with regard to question sixty-three . . . her emotions and feelings, again, her answers were such that they may have caused concern for either side. Even though the answers tend to lean in the favor of the prosecution in the case, neither side would want a juror deciding a case based upon emotions, rather than the facts and the evidence." "In summary," the court said, "with regard to the jurors, while the Court would not grant the challenges for cause, there were answers . . . at least on the questionnaires themselves such that the Court felt that there was sufficient basis for the peremptory challenge. [¶] Even with the addition of [the most recent challenge], the Court will not find a prima facie case."

The Court of Appeal reversed the judgment. It found that the "strong likelihood" standard the trial court applied violated *Batson*, *supra*, 476 U.S. 79. Based primarily on its own comparison of answers the challenged jurors gave with answers of nonchallenged jurors, the court concluded that "a prima facie case of group bias was established and that the judgment must therefore be reversed." Justice Haerle dissented on all points.

We granted the Attorney General's petition for review.

II. DISCUSSION

A. *Background*

(3) Exercising peremptory challenges because of group bias rather than for reasons specific to the challenged prospective juror violates both the California Constitution and the United States Constitution. (*Batson*, *supra*, 476 U.S. 79; *Wheeler*, *supra*, 22 Cal.3d 258.) Because *Wheeler* predated *Batson*, the *Wheeler* court obviously did not have the benefit of *Batson* in establishing the procedures to follow in California. Defendant argues that California's procedures violate *Batson* in two respects: (1) *Wheeler*'s "strong likelihood" standard, or at least the way it was understood and applied in later cases, is a higher standard than *Batson* permits; and (2) California law impermissibly restricts comparative juror analysis. We discuss these contentions in order below, then review the trial court's rulings. But first, to fully understand these issues, it is necessary to review *Wheeler* and *Batson* in detail.

1. *Wheeler*

In *Wheeler*, we concluded "that the use of peremptory challenges to remove prospective jurors on the sole ground of group bias violates" the California Constitution. (*Wheeler*, *supra*, 22 Cal.3d at p. 276.) We then turned to the difficult question of what to do when one party objects to the other party's peremptory challenges on this basis. We began "with the proposition that in any given instance the presumption must be that a party exercising a peremptory challenge is doing so on a constitutionally permissible ground. . . . [¶] Yet it is only a presumption, and must be rebuttable if the foregoing constitutional right is not to be nullified even by honest zeal. The issue is what showing is necessary to rebut it. We must define a burden of proof which a party may reasonably be expected to sustain in meritorious cases, but which he cannot abuse to the detriment of the peremptory challenge system." (*Id.* at p. 278.)

We adopted the following procedure: "If a party believes his opponent is using his peremptory challenges to strike jurors on the ground of group bias alone, he must raise the point in timely fashion and make a prima facie case of such discrimination to the satisfaction of the court. First, . . . he should make as complete a record of the circumstances as is feasible. Second, he must establish that the persons excluded are members of a cognizable group within the meaning of the representative cross-section rule. Third, from all the circumstances of the case he must show a strong likelihood that such persons are being challenged because of their group association rather than because of any specific bias." (*Wheeler*, *supra*, 22 Cal.3d at p. 280, fn. omitted.) We discussed types of evidence the objector may present to make this showing. "[T]he party may show that his opponent has struck most or all of the members of the identified group from the venire, or has used a disproportionate number of his peremptories against the group. He may also demonstrate that the jurors in question share only this one characteristic—their membership in the group—and that in all other respects they are as heterogeneous as the community as a whole. Next, the showing may be supplemented when appropriate by such circumstances as the failure of his opponent to engage these same jurors in more than desultory voir dire, or indeed to ask them any questions at all. Lastly, . . . the defendant need not be a member of the excluded group in order to complain of a violation of the representative cross-section rule; yet if he is, and especially if in addition his alleged victim is a member of the group to which the majority of the remaining jurors belong, these facts may also be called to the court's attention." (*Id.* at pp. 280-281, fn. omitted.)

We then discussed what the court must do. "Upon presentation of this and similar evidence—in the absence, of course, of the jury—the court must

determine whether a reasonable inference arises that peremptory challenges are being used on the ground of group bias alone. We recognize that such a ruling 'requires trial judges to make difficult and often close judgments. They are in a good position to make such determinations, however, on the basis of their knowledge of local conditions and of local prosecutors.' [Citation.] They are also well situated to bring to bear on this question their powers of observation, their understanding of trial techniques, and their broad judicial experience. We are confident of their ability to distinguish a true case of group discrimination by peremptory challenges from a spurious claim interposed simply for purposes of harassment or delay.

"If the court finds that a prima facie case has been made, the burden shifts to the other party to show if he can that the peremptory challenges in question were not predicated on group bias alone. The showing need not rise to the level of a challenge for cause. But to sustain his burden of justification, the allegedly offending party must satisfy the court that he exercised such peremptories on grounds that were reasonably relevant to the particular case on trial or its parties or witnesses—i.e., for reasons of specific bias as defined herein. He, too, may support his showing by reference to the totality of the circumstances: for example, it will be relevant if he can demonstrate that in the course of this same voir dire he also challenged similarly situated members of the majority group on identical or comparable grounds. And again we rely on the good judgment of the trial courts to distinguish bona fide reasons for such peremptories from sham excuses belatedly contrived to avoid admitting acts of group discrimination.

"If the court finds that the burden of justification is not sustained as to any of the questioned peremptory challenges, the presumption of their validity is rebutted." (*Wheeler*, *supra*, 22 Cal.3d at pp. 281-282, fn. omitted.)

2. *Batson*

In *Batson*, the United States Supreme Court held that principles of equal protection "forbid discrimination on account of race in selection of the petit jury." (*Batson*, *supra*, 476 U.S. at p. 88 [106 S.Ct. at p. 1718].) It, too, discussed what to do when one party objects to the other party's peremptory challenges. "As in any equal protection case, the 'burden is, of course,' on the defendant who alleges discriminatory selection of the venire 'to prove the existence of purposeful discrimination.' [Citations.] In deciding if the defendant has carried his burden of persuasion, a court must undertake 'a sensitive inquiry into such circumstantial and direct evidence of intent as may be available.' [Citation.] Circumstantial evidence of invidious intent may be proof of disproportionate impact. [Citation.] We have observed that

under some circumstances proof of discriminatory impact 'may for all practical purposes demonstrate unconstitutionality because in various circumstances the discrimination is very difficult to explain on non-racial grounds.' [Citation.] For example, 'total or seriously disproportionate exclusion of Negroes from jury venires,' [citation] 'is itself such an "unequal application of the law . . . as to show intentional discrimination," ' [citations]." (*Id.* at p. 93 [106 S.Ct. at p. 1721].)

A party alleging discriminatory use of peremptories "may make out a prima facie case of purposeful discrimination by showing that the totality of the relevant facts gives rise to an inference of discriminatory purpose. [Citation.] Once the defendant makes the requisite showing, the burden shifts to the State to explain adequately the racial exclusion." (*Batson*, *supra*, 476 U.S. at pp. 93-94 [106 S.Ct. at p. 1721].) In a footnote, the court stated that its "decisions concerning 'disparate treatment' under Title VII of the Civil Rights Act of 1964 have explained the operation of prima facie burden of proof rules. See *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 [93 S.Ct. 1817, 36 L.Ed.2d 668] (1973); *Texas Dept. of Community Affairs* v. *Burdine*, 450 U.S. 248 [101 S.Ct. 1089, 67 L.Ed.2d 207] (1981); *United States Postal Service Board of Governors* v. *Aikens*, 460 U.S. 711 [103 S.Ct. 1478, 75 L.Ed.2d 403] (1983). The party alleging that he has been the victim of intentional discrimination carries the ultimate burden of persuasion. *Texas Dept. of Community Affairs* v. *Burdine*, *supra*, at 252-256 [101 S.Ct. at pp. 1093-1095]." (*Id.* at p. 94, fn. 18 [106 S.Ct. at pp. 1721-1722].)

The high court discussed in detail the "standards for assessing a prima facie case in the context of discriminatory selection of the venire . . . ." (*Batson*, *supra*, 476 U.S. at p. 96 [106 S.Ct. at p. 1723].) "[A] defendant may establish a prima facie case of purposeful discrimination in selection of the petit jury solely on evidence concerning the prosecutor's exercise of peremptory challenges at the defendant's trial. To establish such a case, the defendant first must show that he is a member of a cognizable racial group [citation], and that the prosecutor has exercised peremptory challenges to remove from the venire members of the defendant's race.[1] Second, the defendant is entitled to rely on the fact, as to which there can be no dispute, that peremptory challenges constitute a jury selection practice that permits

[1]Both *Wheeler*, *supra*, 22 Cal.3d 258, and *Batson*, *supra*, 476 U.S. 79, like this case, involve criminal defendants claiming prosecutors impermissibly challenged members of the defendants' own ethnic group. Other cases have expanded the prohibition into other circumstances. (E.g., *J.E.B. v. Alabama ex rel. T.B.* (1994) 511 U.S. 127 [114 S.Ct. 1419, 128 L.Ed.2d 89] [gender]; *Georgia v. McCollum* (1992) 505 U.S. 42 [112 S.Ct. 2348, 120 L.Ed.2d 33] [defendant's exercise of peremptory challenges]; *Edmonson v. Leesville Concrete Co., Inc.* (1991) 500 U.S. 614 [111 S.Ct. 2077, 114 L.Ed.2d 660] [civil cases]; *Powers v. Ohio* (1991) 499 U.S. 400 [111 S.Ct. 1364, 113 L.Ed.2d 411] [defendant need not be member of the

'those to discriminate who are of a mind to discriminate.' [Citation.] Finally, the defendant must show that these facts and any other relevant circumstances raise an inference that the prosecutor used that practice to exclude the veniremen from the petit jury on account of their race. This combination of factors in the empanelling of the petit jury . . . raises the necessary inference of purposeful discrimination.

"In deciding whether the defendant has made the requisite showing, the trial court should consider all relevant circumstances. For example, a 'pattern' of strikes against black jurors included in the particular venire might give rise to an inference of discrimination. Similarly, the prosecutor's questions and statements during *voir dire* examination and in exercising his challenges may support or refute an inference of discriminatory purpose. These examples are merely illustrative. We have confidence that trial judges, experienced in supervising *voir dire*, will be able to decide if the circumstances concerning the prosecutor's use of peremptory challenges creates a prima facie case of discrimination against black jurors." (*Batson*, *supra*, 476 U.S. at pp. 96-97 [106 S.Ct. at p. 1723].)

"Once the defendant makes a prima facie showing, the burden shifts to the State to come forward with a neutral explanation for challenging black jurors. . . . The prosecutor . . . must articulate a neutral explanation related to the particular case to be tried. The trial court then will have the duty to determine if the defendant has established purposeful discrimination." (*Batson*, *supra*, 476 U.S. at pp. 97-98 [106 S.Ct. at p. 1723], fns. omitted.) In a footnote, the court also stated, "Since the trial judge's findings in the context under consideration here largely will turn on evaluation of credibility, a reviewing court ordinarily should give those findings great deference." (*Id.* at p. 98, fn. 21 [106 S.Ct. at p. 1724].)

In rejecting an argument that its holding could create serious administrative difficulties, the high court noted that "[i]n those States applying a version of the evidentiary standard we recognize today," courts have not experienced these difficulties. (*Batson*, *supra*, 476 U.S. at p. 99 [106 S.Ct. at p. 1724].) "For example, in *People v. Hall*, 35 Cal.3d 161, 672 P.2d 854 (1983), the California Supreme Court found that there was no evidence to show that procedures implementing its version of this standard, imposed five years earlier, were burdensome for trial judges." (*Id.* at p. 99, fn. 23 [106 S.Ct. at p. 1724].)

B. *The Necessary Showing for a Prima Facie Case*

(1c) *Wheeler* used both the terms "strong likelihood" and "reasonable inference" in describing the standard for a prima facie case. (*Wheeler*, *supra*,

excluded group]; *People v. Willis* (2002) 27 Cal.4th 811 [118 Cal.Rptr.2d 301, 43 P.3d 130] [defendant's exercise of peremptory challenges].) We need not consider these cases here.

22 Cal.3d at pp. 280, 281.) We believe it obvious that we considered the two terms to be different phrasing of the same standard. Language in a 1994 Court of Appeal decision, *People v. Bernard* (1994) 27 Cal.App.4th 458 [32 Cal.Rptr.2d 486], however, created some uncertainty. That case seemed to read the two terms as stating different standards, with "reasonable inference" being a lower standard than "strong likelihood." (*Id.* at p. 465.)

In *Wade v. Terhune* (9th Cir. 2000) 202 F.3d 1190, the court found that, at least after *People v. Bernard*, *supra*, 27 Cal.App.4th 458, "California state courts have applied a lower standard of scrutiny to peremptory strikes than the federal Constitution permits." (*Wade v. Terhune*, *supra*, at pp. 1196-1197.) The court noted also that, in recent years, this court has generally cited the "strong likelihood" language rather than the "reasonable inference" language. (*Id.* at p. 1197.) It believed that California courts give criminal defendants less protection than the United States Constitution requires "when they follow the *Wheeler* 'strong likelihood' test in determining whether a *prima facie* case has been established." (*Wade v. Terhune*, *supra*, at p. 1197.) In the court's view, "the *Wheeler* 'strong likelihood' test for a successful *prima facie* showing of bias is impermissibly stringent in comparison to the more generous *Batson* 'inference' test." (*Ibid.*) The court "therefore conclude[d] that California courts in following the 'strong likelihood' language of *Wheeler* are not applying the correct legal standard for a *prima facie* case under *Batson*." (*Ibid.*)

Shortly after *Wade v. Terhune*, *supra*, 202 F.3d 1190, and in response to it, we reiterated that "in California, a 'strong likelihood' means a 'reasonable inference,' " and disapproved *People v. Bernard*, *supra*, 27 Cal.App.4th 458, "to the extent it is inconsistent with *People v. Wheeler*, *supra*, 22 Cal.3d at pages 280-281." (*People v. Box*, *supra*, 23 Cal.4th at p. 1188, fn. 7.) However, the Ninth Circuit Court of Appeals held that this action did not cure the problem it perceived, at least for cases tried after *Bernard* and before *Box* in which trial courts were "following *Bernard*'s take on *Wheeler*." (*Cooperwood v. Cambra* (9th Cir. 2001) 245 F.3d 1042, 1047.) It said that "regardless" of our action in *People v. Box*, *supra*, at page 1188, footnote 7, "whenever state courts use the 'strong likelihood' standard, . . . these courts are applying a lower standard of scrutiny to peremptory strikes than the federal Constitution permits." (*Cooperwood v. Cambra*, *supra*, at p. 1047.) The majority below agreed and, accordingly, found that the trial court used an impermissible standard in determining whether defendant had established a prima facie case.

We reiterate what we implied in *Wheeler* and stated in *Box*: *Wheeler*'s terms "strong likelihood" and "reasonable inference" state the same standard. (*People v. Box*, *supra*, 23 Cal.4th at p. 1188, fn. 7; *Wheeler*, *supra*, 22

Cal.3d at pp. 280-281.) This has always been true, although we recognize that *People v. Bernard*, *supra*, 27 Cal.App.4th 458, may have created some uncertainty for a few years. But the important question for current purposes is not whether California courts have always viewed these terms as the same, but whether California's "strong likelihood" standard violates *Batson*. The *Wade v. Terhune* court and the majority below assumed that *Batson*'s inference test is "more generous" than *Wheeler*'s strong likelihood test without examining what the United State Supreme Court itself has said on the matter. (*Wade v. Terhune*, *supra*, 202 F.3d at p. 1197.) But to address this question, it is necessary to delineate exactly what the high court meant when it equated the necessary prima facie case with "an inference of discriminatory purpose." (*Batson*, *supra*, 476 U.S. at p. 94 [106 S.Ct. at p. 1721].) We believe the court has made its meaning clear.

The high court appears to have given other courts some flexibility in establishing the exact procedures to follow. "We decline, however, to formulate particular procedures to be followed upon a defendant's timely objection to a prosecutor's challenges." (*Batson*, *supra*, 476 U.S. at p. 99 [106 S.Ct. at pp. 1724-1725].) Thus, to some extent at least, *Batson* seems to have "left to lower courts the task of determining the type and quantum of proof necessary for a defendant to establish a prima facie case." (*State v. Duncan* (La. 2001) 802 So.2d 533, 545; see also Note, *Batson v. Kentucky and the Prosecutorial Peremptory Challenge: Arbitrary and Capricious Equal Protection?* (1988) 74 Va. L.Rev. 811, 817 ["The Supreme Court has left the lower courts to grapple with the proper implementation of the *Batson* test. They must determine not only the quantum of proof necessary for a defendant to establish a prima facie case but also the types of explanations sufficient to rebut the defendant's claim"].) But whatever flexibility the high court has left state courts, the California standard is not less generous than the test the *Batson* court itself applies to establish a prima facie case.

In *Batson*, the court stated that its decisions under title VII of the Civil Rights Act of 1964 "explained the operation of prima facie burden of proof rules." (*Batson*, *supra*, 476 U.S. at p. 94, fn. 18 [106 S.Ct. at pp. 1721-1722].) The court has since repeatedly cited title VII cases as authoritative in the *Batson* context. (*Miller-El v. Cockrell* (2003) 537 U.S. 322, __ [123 S.Ct. 1029, 1041, 154 L.Ed.2d 931] (*Miller-El*); *Purkett v. Elem* (1995) 514 U.S. 765, 768 [115 S.Ct. 1769, 1771, 131 L.Ed.2d 834]; *Hernandez v. New York* (1991) 500 U.S. 352, 359 [111 S.Ct. 1859, 1866, 114 L.Ed.2d 395] (plur. opn.).) One of the decisions the court cited in *Batson*, *McDonnell Douglas Corp. v. Green* (1973) 411 U.S. 792 [93 S.Ct. 1817, 36 L.Ed.2d 668], made clear that the plaintiff carried the initial burden of showing actions "from which one can infer, if such actions remain unexplained, that it is *more likely than not* that such actions were 'based on a discriminatory criterion illegal under the Act.'" (*Furnco Construction Corp. v. Waters* (1978) 438 U.S. 567, 576 [98 S.Ct. 2943, 2949, 57 L.Ed.2d 957], italics added.) Another of the decisions that *Batson* cited explained that the burden is not "onerous," but the party nevertheless had to prove "by the *preponderance of the evidence* a prima facie case of discrimination." (*Texas Dept. of Community Affairs v. Burdine* (1981) 450 U.S. 248, 252-253 [101 S.Ct. 1089, 1093], italics added.) It stated that "the prima facie case 'raises an *inference* of discrimination only because we presume these acts, if otherwise unexplained, are *more likely than not* based on the consideration of impermissible factors.'" (*Id.* at p. 254 [101 S.Ct. at p. 1094], italics added.)

In one of the cases *Batson* cited, the high court recognized that the term "prima facie case" is, by itself, ambiguous, so it specifically stated what it meant in this context. "The phrase 'prima facie case' not only may denote the establishment of a legally mandatory, rebuttable presumption, but also may be used by courts to describe the plaintiff's burden of producing enough evidence to permit the trier of fact to infer the fact at issue. 9 J. Wigmore, Evidence § 2494 (3d ed. 1940). *McDonnell Douglas* should have made it apparent that in the Title VII context we use 'prima facie case' in the former sense." (*Texas Dept. of Community Affairs v. Burdine*, *supra*, 450 U.S. at p. 254, fn. 7 [101 S.Ct. at p. 1094].) Thus, when it refers to the objector establishing "an inference of discriminatory purpose" (*Batson*, *supra*, 476 U.S. at p. 94 [106 S.Ct. at p. 1721]), the high court means establishing a legally mandatory rebuttable presumption, and *not* merely presenting enough evidence to *permit the inference*.

Wigmore, in turn, goes into greater detail. He explains that the term "'prima facie case' is used in two senses . . . ." (9 Wigmore, Evidence (Chadbourne rev. ed. 1981) § 2494, p. 378.)[2] The sense the high court does *not* mean in this context created the lower of the two burdens—merely the "duty of producing *some evidence*" sufficient to allow a matter to go to the jury. (Wigmore, at p. 379, italics added.) Wigmore also describes the sense in which the high court uses the term. "[T]he term 'prima facie' is sometimes used as *equivalent to the notion of a presumption*, even in the strict sense of a ruling of the judge putting upon the opponent the duty of producing evidence." (*Ibid.*) Thus, it applies "where the proponent, having the burden of proving the issue (i.e., the risk of nonpersuasion of the jury), has not only removed by sufficient evidence the duty of producing evidence to get past the judge or the jury, but has gone further, and, either by means

[2]We are quoting the most recent revision of this work rather than the earlier version the high court cited in *Texas Dept. of Community Affairs v. Burdine*, *supra*, 450 U.S. 248; the two versions are identical as relevant.

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of a presumption or by a general mass of *strong evidence*, has entitled himself to a ruling that the opponent should fail if he does nothing more in the way of producing evidence." (*Ibid.*, italics added.)

Thus, *Batson* permits a court to require the objector to present, not merely "some evidence" permitting the inference, but "strong evidence" that makes discriminatory intent more likely than not if the challenges are not explained. Nothing suggests the high court has since modified *Batson*'s approach. Indeed, in its most recent decision on this subject, it said it was considering "the three-step framework mandated by *Batson* and reaffirmed in our later precedents" and, in describing the prima facie case requirement, echoed *Batson*'s "inference" language. (*Miller-El*, *supra*, 537 U.S. at pp. ___, ___ [123 S.Ct. at pp. 1040, 1045] ["the inference of discrimination to support a prima facie case"].)

Other states, although not all,[3] have reached similar conclusions regarding *Batson*'s meaning. Citing *Texas Dept. of Community Affairs v. Burdine*, *supra*, 450 U.S. at pages 252-253 [101 S.Ct. at page 1093], the Connecticut Supreme Court has said that under the first stage of the *Batson* inquiry, the "defendant must establish by a preponderance of the evidence a prima facie case of purposeful discrimination." (*State v. Gonzalez* (1988) 206 Conn. 391 [538 A.2d 210, 213].) The Maryland Court of Appeals recognized that *Batson* cited title VII cases "for an explanation of the operation of prima facie burden of proof rules." (*Stanley v. State* (1988) 313 Md. 50 [542 A.2d 1267, 1271].) The Maryland Court of Appeals also concluded that "to make the *prima facie* showing *Batson* requires, the moving party must 'prove by a preponderance of the evidence that the peremptory challenges were exercised in a way that shifts the burden of production to the State and requires it to respond to the rebuttable presumption of purposeful discrimination that arises under certain circumstances.' " (*Mejia v. State* (1992) 328 Md. 522 [616 A.2d 356, 361], quoting *Stanley v. State*, *supra*, at p. 1277.)

Wheeler's term "strong likelihood" signals that it meant "prima facie case" in a similar sense.[4] This burden is not onerous (*Texas Dept. of Community Affairs v. Burdine*, *supra*, 450 U.S. at p. 253 [101 S.Ct. at pp. pp. 1093-1094]), but it is substantial. It is also appropriate to compel the objecting

[3]The Colorado Supreme Court, for example, has interpreted *Batson* as not requiring the defendant "to prove by a preponderance of the evidence that discrimination occurred. Rather, the defendant must present evidence sufficient to raise an inference that discrimination occurred." (*Valdez v. People* (Colo. 1998) 966 P.2d 587, 590.) But the court did not examine what the high court itself has stated on the question.

[4]The dissent claims Evidence Code section 600, subdivision (b), which defines an inference as "a deduction of fact that may logically and reasonably be drawn from another fact or group of facts found or otherwise established in the action," somehow supports its position. (Dis. opn., *post*, at p. 1334.) The *Wheeler* court certainly understood that an inference is a logical deduction of fact. But the question here, which Evidence Code section 600 does not address, is how strong the inference must be. In a criminal trial, for example, an inference of guilt must be beyond a reasonable doubt. The dissent's own unique proposed test—"a substantial danger that the prosecutor's challenges were based on improper grounds"—is not found in Evidence Code section 600. (Dis. opn., *post*, at p. 1334.)

party to meet this burden before it can force the other party to explain the reasons for its peremptory challenges. The burden is one "which a party may reasonably be expected to sustain in meritorious cases, but which he cannot abuse to the detriment of the peremptory challenge system." (*Wheeler*, *supra*, 22 Cal.3d at p. 278.) The high court itself has noted that the *Batson* analysis "permits prompt rulings on objections to peremptory challenges without substantial disruption of the jury selection process." (*Hernandez v. New York*, *supra*, 500 U.S. at p. 358 [111 S.Ct. at pp. 1865-1866] (plur. opn.); see also *id.* at p. 374 [111 S.Ct. at p. 1874] (conc. opn. of O'Connor, J.) [warning against "unacceptable delays in the trial process" that would be "antithetical to the nature and purpose of the peremptory challenge"].)

The term "strong likelihood" has never set a higher standard than *Batson* permits. *Wheeler* "define[d] a burden of proof . . . ." (*Wheeler*, *supra*, 22 Cal.3d at p. 278.) "Except as otherwise provided by law," the default burden of proof in California is "proof by a preponderance of the evidence." (Evid. Code, § 115; see *Conservatorship of Wendland* (2001) 26 Cal.4th 519, 546 [110 Cal.Rptr.2d 412, 28 P.3d 151].) Here, no other law has provided for a different standard. This court has never suggested that *Wheeler* imposed the burden of either clear and convincing proof or proof beyond a reasonable doubt, the two higher burdens of proof that exist in this state. (Evid. Code, § 115.) Moreover, the unqualified word "likelihood" would have been insufficient to signal the correct standard. That word, or the equivalent "likely," has a range of meanings, including some lower than more likely than not. (See *People v. Superior Court* (*Ghilotti*) (2002) 27 Cal.4th 888, 917, 922 [119 Cal.Rptr.2d 1, 44 P.3d 949] [interpreting a statute using the word "likely" as not requiring a showing of a "better than even" chance].) Thus, qualifying "likelihood" with "strong" is appropriate and consistent with *Batson*.

Although not dispositive, the *Batson* court itself considered *Wheeler*'s procedures comparable to its own. It did not specifically cite *Wheeler*'s "strong likelihood" language, but it referred to this court's "procedures implementing its version of [*Batson*'s evidentiary] standard" without suggesting there was anything wrong with those procedures. (*Batson*, *supra*, 476 U.S. at p. 99, fn. 23 [106 S.Ct. at p. 1724].)

We disagree that the "strong likelihood" standard became too high in the interval between *People v. Bernard*, *supra*, 27 Cal.App.4th 458, and *People*

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v. Box, *supra*, 23 Cal.4th 1153. *Bernard* did not somehow transform "strong likelihood" from a correct to an incorrect standard. Like the court in *Wade v. Terhune*, *supra*, 202 F.3d 1190, and the majority below, the *Bernard* court did not examine what *Wheeler* or the high court meant by the word "inference" in this context. It misunderstood that meaning. The *Bernard* court said the presumption that peremptory challenges are being used properly should be rebuttable "only by a strong showing, not a mere inference," because a different standard "might easily transform removal of each and every prospective juror belonging to a cognizable group into a *Wheeler* hearing." (*People v. Bernard*, *supra*, at p. 465.) It also referred to "a reduction of the prima facie standard to a 'reasonable inference' test." (*Ibid.*) This use of the word "inference" was akin to Wigmore's lower sense of evidence merely permitting one to draw an inference, not the higher sense of *Batson* and *Wheeler*. Thus, to the extent *Bernard* erred, it was in assuming "inference" was lower than it really is in this context, not in raising "strong likelihood" to an impermissibly high standard.

Accordingly, *Wheeler*'s standard for establishing a prima facie case of discriminatory use of peremptory challenges is, and always has been, compatible with *Batson*. It merely means that to state a prima facie case, the objector must show that it is more likely than not the other party's peremptory challenges, if unexplained, were based on impermissible group bias. The trial court here properly cited the *Wheeler* standard in determining whether defendant had established a prima facie case.

C. *Appellate Use of Comparative Juror Analysis*

The majority below compared the answers of challenged jurors with those of nonchallenged jurors, a comparison not done at trial, in order to overturn the trial court's finding of no prima facie case. Defendant argues that doing so was proper and that our cases, which he interprets as prohibiting all comparative juror analysis, violate *Batson*, *supra*, 476 U.S. 79. Defendant misunderstands our jurisprudence. **(2c)** We have observed that engaging in comparative juror analysis *for the first time on appeal* is unreliable and inconsistent with the deference reviewing courts necessarily give to trial courts, but we have never prohibited trial courts from doing so or the party objecting to the challenges from relying on such analysis in seeking to make a prima facie case.

In *People v. Johnson*, *supra*, 47 Cal.3d 1194, we revisited *People v. Trevino* (1985) 39 Cal.3d 667 [217 Cal.Rptr. 652, 704 P.2d 719], which had engaged in comparative juror analysis for the first time on appeal. We found that *Trevino* had "placed undue emphasis on comparisons of the stated

reasons for the challenged excusals with similar characteristics of nonmembers of the group who were not challenged by the prosecutor. First, we note . . . that the comparison is one-sided since it ignores the characteristics of the other . . . jurors against whom the prosecutor also exercised peremptory challenges. [Citation.] Moreover, we fail to see how a trial judge can reasonably be expected to make such detailed comparisons mid-trial." (*People v. Johnson*, *supra*, at p. 1220.)

We explained that "use of a comparison analysis to evaluate the bona fides of the prosecutor's stated reasons for peremptory challenges does not properly take into account the variety of factors and considerations that go into a lawyer's decision to select certain jurors while challenging others that appear to be similar. Trial lawyers recognize that it is a combination of factors rather than any single one which often leads to the exercise of a peremptory challenge. In addition, the particular combination or mix of jurors which a lawyer seeks may, and often does, change as certain jurors are removed or seated in the jury box." (*People v. Johnson*, *supra*, 47 Cal.3d at p. 1220.)[5] We found it apparent "that the very dynamics of the jury selection process make it difficult, if not impossible, on a cold record, to evaluate or compare the peremptory challenge of one juror with the retention of another juror which on paper appears to be substantially similar. [Attempting] to make such an analysis of the prosecutor's use of his peremptory challenges is highly speculative and less reliable than the determination made by the trial judge who witnessed the process by which the defendant's jury was selected. It is therefore with good reason that we and the United States Supreme Court give great deference to the trial court's determination that the use of peremptory challenges was not for an improper or class bias purpose." (*Id.* at p. 1221.)

Accordingly, we disapproved *People v. Trevino*, *supra*, 39 Cal.3d 667, to the extent it was inconsistent with these views and returned to a "standard of truly giving great deference to the trial court in distinguishing bona fide reasons from sham excuses." (*People v. Johnson*, *supra*, 47 Cal.3d at p. 1221.) Like the high court, we stated we "'may assume that trial judges, in supervising *voir dire* in light of our decision today, will be alert to identify a prima facie case of purposeful discrimination.'" (*Ibid.*, quoting *Batson*, *supra*, 476 U.S. at p. 99, fn. 22 [106 S.Ct. at p. 1724].)

Since then, we have not engaged in comparative juror analysis for the first time on appeal. **(4)** "If the trial court makes a 'sincere and reasoned

[5]This case presents an example. The district attorney accepted the jury four times with C.T. on it before he peremptorily challenged her, apparently due to a change in the jury's composition.

effort' to evaluate the nondiscriminatory justifications offered, its conclusions are entitled to deference on appeal. In such circumstances, an appellate court will not reassess good faith by conducting its own comparative juror analysis. Such an approach would undermine the trial court's credibility determinations and would discount ' "the variety of [subjective] factors and considerations," ' including 'prospective jurors' body language or manner of answering questions,' which legitimately inform a trial lawyer's decision to exercise peremptory challenges." (*People v. Montiel*, *supra*, 5 Cal.4th at p. 909.)

Defendant argues that *any* rule against comparative juror analysis is invalid but, as a backup position, he also argues that, at least, the rule is limited to the *second* stage of the trial court's duty—judging the validity of the reasons for the exercising of challenges after it has found a prima facie case—and does not apply to the *first* stage—judging whether the objector has established a prima facie case to begin with. We disagree. Although some of our decisions, including *People v. Johnson*, *supra*, 47 Cal.3d 1194, did involve the second stage, others reviewed trial court findings of no prima facie case. (E.g., *People v. Box*, *supra*, 23 Cal.4th at pp. 1188, 1190; *People v. Turner* (1994) 8 Cal.4th 137, 167, 169-170 [32 Cal.Rptr.2d 762, 878 P.2d 521].) Differences do exist in the two procedural postures. At the first stage, the party making the challenges is not asked to explain them, so the trial court does not have to judge that party's credibility. But the concerns about the inability of a reviewing court to judge the dynamics of jury selection *on a cold record* apply to both stages. A comparison of the jurors' answers is unreliable when divorced from the context of the trial. A trial court, but not a reviewing court, is able to place the answers into context and draw meaning from *all* the circumstances, including matters not discernable from the record.

Even the Ninth Circuit Court of Appeals, which has a different practice in this regard than we (*Burks v. Borg* (9th Cir. 1994) 27 F.3d 1424, 1427), reviews a trial court's finding of no prima facie case deferentially. (*Tolbert v. Page* (9th Cir. 1999) 182 F.3d 677 (in bank).) Its reasoning for giving such deference echoes ours both in giving similar deference and in not engaging in comparative juror analysis for the first time on appeal. "[T]he trial court is better positioned to decide the *Batson* prima facie issue, which involves a ' "factual inquiry" that "takes into account all the possible explanatory factors" in the particular case.' [Citation.] Whether or not 'all the relevant circumstances' 'raise an inference' of discrimination will depend on factors such as the attitude and behavior of the challenging attorney and the prospective jurors manifested during voir dire. As a purely practical matter, the trial judge's unique perspective of voir dire enables the judge to have

first-hand knowledge and observation of critical events. [Citation.] The trial judge personally witnesses the totality of circumstances that comprises the 'factual inquiry,' including the jurors' demeanor and tone of voice as they answer questions and counsel's demeanor and tone of voice in posing the questions. [Citation.] The trial judge is able to observe a juror's attention span, alertness, and interest in the proceedings and thus will have a sense of whether the prosecutor's challenge can be readily explained by a legitimate reason. . . . In addition, the trial court is 'experienced in supervising voir dire.' [Citations.]

"The appellate court, on the other hand, must judge the existence of a prima facie case from a cold record. An appellate court can read a transcript of the voir dire, but it is not privy to the unspoken atmosphere of the trial court—the nuance, demeanor, body language, expression and gestures of the various players. [Citation.] . . . [T]he prima facie inquiry is so fact-intensive and so dependent on first-hand observations made in open court that the trial court is better positioned to decide the issue . . . ." (*Tolbert v. Page*, *supra*, 182 F.3d at pp. 683-684.)

"While [*People v. Johnson*, *supra*, 47 Cal.3d 1194] limits the scope of appellate review of a trial court's *Batson* determination, it does not preclude comparative analysis by the trial court." (*Burks v. Borg*, *supra*, 27 F.3d at p. 1428.) We do not, and cannot reasonably, require trial judges to perform such analysis *itself* (*People v. Johnson*, *supra*, 47 Cal.3d at p. 1220), but the objecting party may make the argument for the trial court to evaluate. For example, in *People v. Crittenden* (1994) 9 Cal.4th 83 [36 Cal.Rptr.2d 474, 885 P.2d 887], the defendant presented at trial "evidence, compiled from the biographical information of 50 prospective jurors," and compared those jurors' answers in support of his argument that the prosecutor improperly challenged a particular juror. (*Id.* at p. 116.) As the reviewing court, we considered this and other evidence and concluded that "[i]n light of all the relevant circumstances, the trial court properly could find that defendant had not made a prima facie showing . . . ." (*Id.* at p. 119.)

In support of his position, defendant cites *Miller-El*, *supra*, 537 U.S. 322 [123 S.Ct. 1029], but that case merely provides another example of a reviewing court considering evidence of comparative juror analysis after it had been presented to the trial court. *Miller-El* was tried before the decision in *Batson*, *supra*, 476 U.S. 79. At trial, the defendant had objected that the prosecution was using peremptory challenges discriminatorily, but the *Batson* procedures had not yet been established. *Batson* was decided while the case was on appeal. The Texas Court of Criminal Appeals remanded the case to the original trial court for new findings in light of *Batson*. Defendant

presented to the trial court several types of evidence supporting a prima facie case. Before the original trial, he had presented "evidence relating to a pattern and practice of race discrimination in the *voir dire*." (*Miller-El*, *supra*, 537 U.S. at p. __ [123 S.Ct. at p. 1036].) Then, two years later, "he presented, to the same state [trial] court, evidence that directly related to the conduct of the prosecutors in his case." (*Ibid.*) Some of the latter evidence was comparative juror analysis of the type offered for the first time on appeal here. (*Id.* at p. __ [123 S.Ct. at p. 1043].) After the state courts denied relief, the federal district court denied relief on federal habeas corpus, and the appellate court denied a certificate of appealability which, under federal law, prevented the defendant from appealing the matter. The United States Supreme Court reversed the denial of a certificate of appealability. It did not directly address the *Batson* question, but rather determined that the issue was "debatable" and, under federal habeas corpus law, the appellate court should have considered it on the merits. (*Id.* at p. __ [123 S.Ct. at p. 1045].) Its discussion made clear that the comparative juror analysis presented to the trial court was among the evidence reviewing courts should consider. (*Id.* at p. __ [123 S.Ct. at p. 1043].) This conclusion is consistent with our practice. Nothing in *Miller-El*, however, suggests that a reviewing court must engage in comparative juror analysis *for the first time on appeal*.

Both *Wheeler* and *Batson* place the burden of making the prima facie showing on the objecting party. (*Batson*, *supra*, 476 U.S. at p. 96 ["the defendant must show that these facts and any other relevant circumstances raise an inference that the prosecutor used that practice to exclude the veniremen from the petit jury on account of their race"]; *Wheeler*, *supra*, 22 Cal.3d at p. 280 [the objecting party must "make a prima facie case of . . . discrimination to the satisfaction of the court," should "make as complete a record of the circumstances as is feasible," and "from all the circumstances of the case . . . must show a strong likelihood" of improper challenges].) Neither decision requires a reviewing court to search the record itself for evidence that might have supplemented the objector's showing. Nor must the trial court consider arguments not made and evidence not presented, although nothing prevents it from doing so in judging all of the circumstances.

Defendant argues that our statement that we cannot expect a trial judge "to make such detailed comparisons mid-trial" (*People v. Johnson*, *supra*, 47 Cal.3d at p. 1220) "overlooks the trial lawyers' role." He argues that the attorneys can make these arguments to assist the trial court "because, under the adversary system, the job of marshaling the relevant evidence is performed in the first instance by the lawyers. Accordingly, comparative juror analysis can easily and realistically be employed by state trial judges, too." We agree. Indeed, as noted, *People v. Crittenden*, *supra*, 9 Cal.4th 83,

provides an example of the attorneys doing just this for the trial court's consideration. But defendant did not make this kind of showing at trial, and we cannot expect the trial court to do so itself.

We have also said that comparative juror analysis is "largely beside the point" because of the legitimate subjective concerns that go into selecting a jury. (*People v. Arias* (1996) 13 Cal.4th 92, 136, fn. 16 [51 Cal.Rptr.2d 770, 913 P.2d 980].) But it is not *irrelevant*. Although such analysis, by itself, proves little, properly presented to the trial court, it can be among the "all relevant circumstances" (*Batson*, *supra*, 476 U.S. at pp. 96-97 [106 S.Ct. at p. 1723]) or "all the circumstances of the case" (*Wheeler*, *supra*, 22 Cal.3d at p. 280) that the trial court must consider in making its determination.

In *People v. Howard* (1992) 1 Cal.4th 1132 [5 Cal.Rptr.2d 268, 824 P.2d 1315], we did not "limit[] our review . . . solely to counsel's presentation at the time of the motion. This is because other circumstances might support the finding of a prima facie case even though a defendant's showing [was itself inadequate]. Nor should the trial court blind itself to everything except defense counsel's presentation. Indeed, we have emphasized that such rulings require trial judges to consider 'all the circumstances of the case' [citation] and call upon judges' ' "powers of observation, their understanding of trial techniques, and their broad judicial experience." ' [Citations.] The trial judge in this case, for example, obviously knew that defendant belonged to the same group as the challenged jurors and that his victims did not. Clearly these are relevant factors [citation], and they were apparent to the trial court even though defendant did not mention them during his *Wheeler* motion." (*Id.* at p. 1155.) "For these reasons," we said, "when a trial court denies a *Wheeler* motion without finding a prima facie case of group bias the reviewing court considers the entire record of voir dire." (*Ibid.*) Certainly, the trial court should consider obvious matters, and it can consider any other circumstances it finds relevant in the particular case. But, midtrial, we cannot expect, and do not demand, trial courts to engage sua sponte in the sort of comparative juror analysis that appellate lawyers and courts can do after scouring the often lengthy appellate record during the appeal. And, given the inability of reviewing courts to reliably conduct such analysis on a cold record, those courts are not required to do so for the first time on appeal.

Defendant cites a number of federal cases that engage in comparative juror analysis in a different way than we do. The Ninth Circuit, for example, has stated that its practice is different than ours. (*Burks v. Borg*, *supra*, 27

F.3d at p. 1427.)[6] Other courts may certainly adopt different procedures than we. But we do not believe that comparative juror analysis for the first time on appeal is constitutionally compelled. The *Batson* court itself stated that in deciding whether the defendant has made the necessary showing, "the *trial court* should consider all relevant circumstances." (*Batson, supra*, 476 U.S. at pp. 96-97 [106 S.Ct. at p. 1723], italics added.) It relies heavily on "trial judges, experienced in supervising *voir dire*," to make this determination. (*Id.* at p. 97 [106 S.Ct. at p. 1723].) "During jury selection, the entire *res gestae* take place in front of the trial judge. Because the judge has before him the entire venire, he is well situated to detect whether a challenge to the seating of one juror is part of a 'pattern' of singling out members of a single race for peremptory challenges." (*United States v. Armstrong* (1996) 517 U.S. 456, 467-468 [116 S.Ct. 1480, 1488, 134 L.Ed.2d 687].) The "entire *res gestae*" do not take place in front of an appellate court.

The *Batson* court rejected the argument that its holding would "create serious administrative difficulties" and noted that California had not found its own version to be "burdensome for trial judges." (*Batson, supra*, 476 U.S. at p. 99 & fn. 23 [106 S.Ct. at p. 1724], citing *People v. Hall* (1983) 35 Cal.3d 161 [197 Cal.Rptr. 71, 672 P.2d 854].) However, requiring trial courts to engage in comparative juror analysis sua sponte in the middle of the trial *would* be burdensome. Moreover, permitting appellate courts to overturn trial court decisions based on their own comparative analysis of a cold record, divorced from the nuances of trial not apparent from the record, is inconsistent with the deference reviewing courts necessarily give trial courts. We see nothing in the high court decisions requiring us to defer less to trial courts or engage in our own comparative juror analysis for the first time on appeal.[7]

(2d) Accordingly, we maintain our long-standing practice. When the objecting party presents comparative juror analysis to the trial court, the

[6]That court also noted that the United States Supreme Court "has not yet ruled on the role of comparative analysis on appellate review, so no one is quite sure whether our circuit or the California Supreme Court is right." (*Burks v. Borg, supra*, 27 F.3d at p. 1427.)

[7]The dissent claims that our reliance on *People v. Johnson, supra*, 47 Cal.3d 1194, is misplaced because *Johnson* barred using comparative juror analysis on appeal *whether or not the parties raised that approach in the trial court.* (Dis. opn., *post*, at pp. 1330-1332.) Contrary to the dissent, *Johnson*'s underlying rationale was predicated on the fact that the defendant made no comparative juror argument *at trial*. We reasoned that: (1) a trial judge could not reasonably be expected to make detailed comparisons of jurors midtrial *sua sponte*, and (2) *without explanation at trial* from the party who exercised the challenge, comparative juror analysis could not accurately take into account the various factors that influence the decision to make a peremptory challenge. (*Johnson, supra*, at pp. 1220-1221.) We then concluded, "It should be apparent, *therefore*, that the very dynamics of the jury selection process make it difficult, if not impossible, *on a cold record*, to evaluate or compare the peremptory challenge of one juror with the retention of another juror which *on paper* appears to be substantially similar." (*Id.* at p. 1221, italics added.) In other words, the trial and appellate courts are in no

reviewing court must consider that evidence, along with everything else of relevance, in reviewing, deferentially, the trial court's ruling. When such an analysis was not presented at trial, a reviewing court should not attempt its own comparative juror analysis for the first time on appeal, especially when, as here, the record supports the trial court's finding of no prima facie case. While we decline to prohibit the practice outright, we are hard pressed to envision a scenario where comparative juror analysis for the first time on appeal would be fruitful or appropriate.

D. *The Trial Court's Ruling in This Case*

We have already alluded to the standard of appellate review of a trial court's finding of no prima facie case. Because these rulings call upon trial judges' personal observations, we review them with considerable deference. (*People v. Jones* (1998) 17 Cal.4th 279, 294 [70 Cal.Rptr.2d 793, 949 P.2d 890].) Of course, "deference is not abdication . . . ." (*People v. Scott* (1997) 15 Cal.4th 1188, 1212 [65 Cal.Rptr.2d 240, 939 P.2d 354]; see also *Miller-El, supra*, 537 U.S. at p. __ [123 S.Ct. at p. 1041] ["deference does not imply abandonment or abdication of judicial review"].) Accordingly, we review the entire record for evidence supporting the trial court's ruling. But if the record suggests grounds on which the prosecutor might reasonably have challenged the jurors, we affirm that ruling. (*People v. Howard, supra*, 1 Cal.4th at p. 1155.)

(5) The record here suggests grounds for the prosecutor to have reasonably challenged these jurors. The trial judge, "who had performed much of and observed the remainder of the voir dire, [and thus] was in the best position to determine under 'all the relevant circumstances' of the case" whether a prima facie showing existed (*People v. Box, supra*, 23 Cal.4th at p. 1189), mentioned reasons as to two of the jurors. The court noted that these reasons did not warrant a challenge for cause, but peremptory challenges need not be based on grounds for a challenge for cause. (*People v. Jones, supra*, 17 Cal.4th at p. 294.) So far as we can review the court's reasons on

position to engage in comparative juror analysis on their own, without the issue first being raised by the parties at trial. Our approach is entirely consistent with *Johnson*.

Contrary to the dissent, *People v. Johnson, supra*, 47 Cal.3d 1194, is also entirely consistent with *Miller-El*. In that case, the high court had "no difficulty in using comparative juror analysis" (dis. opn., *post*, at p. 1332) because it was simply reviewing the state court record, i.e., comparative juror evidence that the defendant had first presented to the trial judge in support of his *Batson* motion. (*Miller-El, supra*, 537 U.S. at pp. __, __ [123 S.Ct. at pp. 1035-1036, 1043-1045].) Evidently, none of the parties disputed that a comparative juror analysis is a proper or necessary procedure in deciding a *Batson* claim. Thus, that issue was not before the high court, which only addressed whether the underlying evidence before the state trial court supported the issuance of a certificate of appealability. (*Id.* at pp. __-__ [123 S.Ct. at pp. 1042-1045].)

the cold record, the record supports them. Defendant has a different view of the significance of these jurors' answers and courtroom statements, but we see no basis on which to overturn the trial court's determinations.

As the majority below and defendant point out, the trial court did not specifically discuss the third of the challenged jurors, C.T., who was actually the first one challenged. But at trial, defendant did not argue that no reason existed to challenge that juror. His first *Wheeler* motion was "specifically" directed towards the challenge of S.E. His second *Wheeler* motion also never referred to C.T. The court acted reasonably in discussing the arguments defendant made, not arguments he did not make. Moreover, as the dissent below noted, the record discloses race-neutral grounds for challenging C.T.: "(1) she was childless (this case involved the death and alleged abuse of a minor), (2) the police had made no arrest after the robbery of her home five or six years ago, and (3) she omitted to answer the two questions in the questionnaire dealing with her opinions of prosecuting and defending attorneys." (Fn. omitted.) As that dissent also noted, "lack of family may have appeared relevant to the prosecutor in a case involving child abuse and reasonably could be deemed to constitute a non-discriminatory basis for striking the venireman." (*U.S. v. Lewis* (9th Cir. 1988) 837 F.2d 415, 417.)

Defendant stresses that the district attorney used three of his 12 peremptory challenges to remove all three African-American prospective jurors, and this case involves an African-American defendant charged with killing "his White girlfriend's child." These circumstances are obviously highly relevant to whether a prima facie case existed. (*Wheeler*, *supra*, 22 Cal.3d at pp. 280-281.) They definitely warranted the trial court's careful scrutiny, which that court gave. The court considered the question close but found no prima facie case under all the circumstances. We will not second-guess its determination by attempting a comparative juror analysis for the first time on appeal.

An additional note about the circumstances of this case is in order. Viewing these circumstances in isolation, it certainly looks suspicious that all three African-American prospective jurors were removed from the jury. But viewing a case like this in isolation is all a reviewing court *can* do. When this issue comes before a reviewing court, the circumstances often will be akin to those here. A reviewing court does not review the ordinary, nonsuspicious cases of jury selection. (Nor does it review those cases in which the trial court *grants* a *Wheeler* motion, so it also never sees those rulings.) A reviewing court does not see the big picture; it cannot place a case like this into perspective. It cannot know whether a case like this is typical, thus suggesting a real problem, or merely a statistical aberration of

the type that will inevitably occur occasionally given such a small sampling. The trial court, however, is capable of seeing the big picture. It can place a specific trial in a county into perspective. Trial judges "'are in a good position to make such determinations . . . on the basis of their knowledge of local conditions and of local prosecutors.'" (*Wheeler*, *supra*, 22 Cal.3d at p. 281.) This is another reason we must, and can, rely on trial courts to determine, from all the relevant circumstances, whether a prima facie case of discriminatory use of peremptory challenges exists.

Defendant cites *Miller-El*, *supra*, 537 U.S. __ [123 S.Ct. 1029], in support of his argument that a prima facie case existed here. In *Miller-El*, the prosecution conceded in the high court that the defendant had established a prima facie case. (*Id.* at p. __ [123 S.Ct. at p. 1040].) But the evidence the defendant presented in that case was far stronger than here. The defendant there presented several types of evidence to the original trial court: (1) the statistical disparity of peremptory challenges of African-Americans (10 of 11 were challenged) compared to others (4 of 31 were challenged); (2) a comparison of the manner in which the prosecution questioned African-Americans and others, which suggested "that the manner in which members of the venire were questioned varied by race" (*id.* at p. __ [123 S.Ct. at p. 1037]); (3) a comparison of the answers of prospective jurors akin to the comparative juror analysis defendant attempts here to present for the first time on appeal (*id.* at p. __ [123 S.Ct. at p. 1043]); (4) the prosecution's use of a procedural practice unknown in California called "jury shuffling," which can be used to manipulate which prospective jurors are actually called;[8] and (5) evidence that the district attorney's office historically had a pattern and practice of racial discrimination in voir dire.

Here, defendant's showing in the trial court consisted primarily of the statistical disparity of peremptory challenges between African-Americans and others. Regarding this type of evidence, *Miller-El* stated that "the statistical evidence alone raises some debate as to whether the prosecution acted with a race-based reason when striking prospective jurors. The prosecutors used their peremptory strikes to exclude 91% of the eligible African-American venire members, and only one served on petitioner's jury. In total, 10 of the prosecutors' 14 peremptory strikes were used against African-Americans. Happenstance is unlikely to produce this disparity." (*Miller-El*, *supra*, 537 U.S. at p. __ [123 S.Ct. at p. 1042].) Here, the number of strikes is smaller, and thus perhaps more explainable by happenstance: three of the

[8] "On at least two occasions the prosecution requested shuffles when there were a predominate number of African-Americans in the front of the panel," with the result that the African-Americans were spread out more randomly and thus less likely to be called. (*Miller-El*, *supra*, 537 U.S. at p. __ [123 S.Ct. at p. 1038].)

prosecutors' 12 peremptory strikes were used against African-Americans. In one respect, however, the percentages are even worse: the prosecutor challenged all three (100 percent) of the eligible African-Americans. But the high court did not cite the statistical evidence to show that it alone necessarily established a prima facie case, but only to support the overall conclusion that the merits of the habeas corpus petition were sufficiently debatable that the federal appellate court should have permitted an appeal. Here, both the trial court and this court have considered the issue on the merits. The statistics here are indeed troubling and, as the trial court stated, the question was close, but, for the reasons explained, we see no basis to overturn the trial court's carefully considered ruling.

(6) Defendant and the dissent (dis. opn., *post*, at p. 1340) also argue that the district attorney asked no questions of the African-American jurors he challenged. This circumstance may also be relevant. (*Wheeler*, *supra*, 22 Cal.3d at p. 281.) But this trial occurred in 1998, at a time the trial court had primary responsibility for conducting voir dire. (Code Civ. Proc., former § 223, as added by Prop. 115, approved by voters at Prim. Elec., June 5, 1990.) The district attorney asked no questions of any prospective juror, including the nine of other ethnic groups he also challenged. Thus, asking no questions was of little or no significance here.

III. CONCLUSION

California's reviewing courts are as ready as any to combat the pernicious effects of racial and other improper discrimination, in jury selection as in other matters. (E.g., *People v. Silva* (2001) 25 Cal.4th 345, 386 [106 Cal.Rptr.2d 93, 21 P.3d 769] [reversing a sentence of death because of error as to a single prospective juror].) But, like the United States Supreme Court, we necessarily, yet confidently, rely primarily on the good judgment of our trial courts to make the difficult determinations the procedures established in *Batson*, *supra*, 476 U.S. 79, and *Wheeler*, *supra*, 22 Cal.3d 258, require. The record in this case provides no reason to believe the trial court here failed to perform its duty properly.

Accordingly, we reverse the judgment of the Court of Appeal and remand the matter for further proceedings consistent with our opinion.

George, C. J., Baxter, J., Brown, J., and Moreno, J., concurred.

WERDEGAR, J., Concurring and Dissenting.—I concur in parts I., II.A. and II.C. of the majority opinion. With respect to the proper standard of proof for establishing a prima facie showing under *People v. Wheeler* (1978) 22 Cal.3d 258 [148 Cal.Rptr. 890, 583 P.2d 748] and *Batson v. Kentucky* (1986) 476 U.S. 79 [106 S.Ct. 1712, 90 L.Ed.2d 69], I dissent and join part II of Justice Kennard's dissenting opinion.

KENNARD, J., Dissenting.—A peremptory challenge is presumed to have been based on valid grounds. If a defendant seeks to rebut this presumption, claiming that a prosecutor is improperly using peremptory challenges to remove prospective jurors solely because of group bias, the defendant must first establish a prima facie showing of discriminatory use.[1] (*Batson v. Kentucky* (1986) 476 U.S. 79 [106 S.Ct. 1712, 90 L.Ed.2d 69] (*Batson*); *People v. Wheeler* (1978) 22 Cal.3d 258 [148 Cal.Rptr. 890, 583 P.2d 748] (*Wheeler*).) If the trial court finds that a prima facie case has been established, it will ask the prosecutor to explain the basis for the peremptory challenges. If, after hearing the explanations, "the court finds that the burden of justification is not sustained as to any of the questioned peremptory challenges, the presumption of their validity is rebutted . . . and it must dismiss the jurors thus far selected." (*Wheeler*, *supra*, at p. 282.)

This case presents two issues concerning motions based on *Wheeler* and *Batson* objecting to prosecutorial peremptory challenges: (1) Should this court use comparative juror analysis—comparing the challenged jurors with others who were not challenged—in reviewing the trial court decision that defendant had failed to establish a prima facie showing that the prosecutor's challenges had a discriminatory purpose? (2) What must a defendant prove to make that initial prima facie showing of discriminatory purpose? On the first question, the majority relies on *People v. Johnson* (1989) 47 Cal.3d 1194 [255 Cal.Rptr. 569, 767 P.2d 1047], to hold that an appellate court ordinarily should not use comparative jury analysis in reviewing a trial court's denial of a *Wheeler-Batson* motion if the defendant has not raised that analysis in the trial court. I agree with that result, but would reach it by a different route. On the second question, the majority upholds the trial court's ruling finding no prima facie case on the ground that defendant failed to show that it is more likely than not that the peremptory challenges had a discriminatory purpose. I disagree with this standard, and would hold that a defendant need only prove facts that, if unexplained, permit a reasonable inference of discriminatory purpose. Even without using comparative juror analysis, the record here shows that defendant met that standard.

[1] I speak of a prosecutor's use of peremptory challenges and a defendant's objection because this case, like both *Wheeler* and *Batson*, arose in that factual setting. The principles of those decisions, however, also apply to peremptory challenges by a criminal defendant (*Georgia v. McCollum* (1992) 505 U.S. 42 [112 S.Ct. 2348, 120 L.Ed.2d 33]) and to challenges by parties to civil cases (*Edmonson v. Leesville Concrete Co., Inc.* (1991) 500 U.S. 614 [111 S.Ct. 2077, 114 L.Ed.2d 660]).

I

Comparative juror analysis involves comparing the challenged jurors to jurors who were not challenged to determine whether a proffered reason for a challenge is genuine or pretextual. For example, if the prosecution says it challenged juror A for not having a high school education, it would be of interest whether the prosecution challenged jurors B and C who also lack that education. If the prosecutor did, that would suggest that the proffered ground for challenge was genuine; if not, it would suggest there was probably some other reason for the challenge to juror A. Here, the trial court found defendant had not established a prima facie showing that the prosecutor's challenges had a discriminatory purpose because, in the court's view, the record showed neutral reasons why the prosecutor might have challenged the jurors in question. The defense could have used comparative juror analysis to question those reasons, but it did not do so. By failing to use comparative juror analysis in the trial court, the defense not only deprived the prosecution of the opportunity to explain the pattern of its preemptive challenges to the trial court, but it also deprived the trial court of the opportunity to evaluate that explanation in the context of the voir dire the court observed.

It is well settled that ordinarily an appellate court will not consider a theory not raised at trial. (See generally 1 Appeals & Writs in Criminal Cases (Cont.Ed.Bar 2d ed. 2000) § 1.165, pp. 164.2-165, and cases there cited; Erwin et al., Cal. Criminal Defense Practice (2002) § 101.35, pp. 108-112 and cases there cited.) "The general rule confining the parties on appeal to the theory advanced below is based on the rationale that the opposing party should not be required to defend for the first time on appeal against a new theory that 'contemplates a factual situation the consequences of which are open to controversy and were not put in issue or presented at the trial.' [Citation.]" (*Ward v. Taggart* (1959) 51 Cal.2d 736, 742 [336 P.2d 534].) There are many examples. (See, e.g., *People v. Carrera* (1989) 49 Cal.3d 291, 324 [261 Cal.Rptr. 348, 777 P.2d 121] [appellant cannot raise new ground for claiming evidence was inadmissible]; *People v. Raley* (1992) 2 Cal.4th 870, 898 [8 Cal.Rptr.2d 678, 830 P.2d 712] [constitutional contention cannot be raised on appeal when issue was argued only on statutory grounds in the trial court].) Because defendant here failed to use comparative jury analysis in the trial court, this rule precludes defendant from arguing that theory on appeal.

The majority reaches the same conclusion, but instead of basing that conclusion on well-settled principles of appellate review, it relies on a

special California rule barring appellate courts from undertaking comparative juror analysis. This rule derives from *People v. Johnson*, *supra*, 47 Cal.3d 1194 (*Johnson*). Although the recitation of facts in *Johnson* suggests that the defendant did not use a comparative juror analysis in arguing his *Wheeler* motion at trial, the reasoning of this court did not rest on that fact. Instead, the *Johnson* majority gave three reasons for eschewing use of comparative jury analysis: (1) that a trial judge could not reasonably be expected to make detailed comparisons of jurors midtrial; (2) that comparative juror analysis does not properly take into account the variety of factors and considerations that influence the decision whom to challenge; and (3) that a comparative juror analysis by an appellate court on a cold record is less reliable than the decision of the trial court, which can observe the jurors and appreciate the setting of the challenges. (*Id.* at pp. 1220-1221.)

Because those reasons apply whether or not the defendant argues comparative juror analysis in the trial court, the more reasonable reading of *Johnson* is that it barred the use of comparative juror analysis on appeal whether or not that approach was urged before the trial court. Later decisions of this court followed *Johnson* and without exception rejected comparative juror analysis. None says that the reason for not engaging in comparative juror analysis was that the defendant did not raise the matter at trial; many do not even indicate whether the defendant urged comparative jury analysis in support of the motion in the trial court. (See, e.g., *People v. Catlin* (2001) 26 Cal.4th 81, 119, fn. 5 [109 Cal.Rptr.2d 31, 26 P.3d 357]; *People v. Ayala* (2000) 24 Cal.4th 243, 270 [99 Cal.Rptr.2d 532, 6 P.3d 193]; *People v. Jones* (1998) 17 Cal.4th 279, 295 [70 Cal.Rptr.2d 793, 949 P.2d 890]; *People v. Turner* (1994) 8 Cal.4th 137, 164 [32 Cal.Rptr.2d 762, 878 P.2d 521].)[2] In *People v. Montiel* (1993) 5 Cal.4th 877, 911 [21 Cal.Rptr.2d 705, 855 P.2d 277], this court refused to use comparative jury analysis on appeal even though the prosecutor had used that analytic technique at trial to justify his peremptory challenges.

But a unique California rule barring comparative juror analysis on appeal, even if that technique were used in the trial court, would be constitutionally suspect under the recent United States Supreme Court decision in *Miller-El*

[2] *People v. Crittenden* (1994) 9 Cal.4th 83 [36 Cal.Rptr.2d 474, 885 P.2d 887], is not necessarily an exception to this pattern. The defendant there did raise comparative juror analysis at trial. On appeal, this court did not review the defendant's analysis and compare individual jurors, but said that the analysis was inapplicable because the defendant was comparing the challenged Black jurors to other jurors who had also been removed by peremptory challenge.

v. Cockrell (2003) __ U.S. __ [123 S.Ct. 1029, 154 L.Ed.2d 931] (*Miller-El*).[3] In *Miller-El*, the question before the Supreme Court was whether the defendant's *Batson* claim was an appealable issue under 28 United States Code section 2253(c)(2), which requires that the appellant demonstrate "a substantial showing of the denial of a constitutional right." The majority used comparative juror analysis to conclude that the defendant should have been given a certificate of appeal. (*Miller-El, supra*, __ U.S. at p. __ [123 S.Ct. at pp. 1042-1043].) Justice Scalia, concurring, also applied comparative juror analysis. (__ U.S. at p. __ [123 S.Ct. at pp. 1047-1048] (conc. opn. of Scalia, J.).) In dissenting, Justice Thomas disagreed with conclusions of the majority's comparative juror analysis, but not with the appropriateness of the technique. (__ U.S. at p. __ [123 S.Ct. at p. 1053] (dis. opn. of Thomas, J.).)

The United States Supreme Court ruling in *Miller-El, supra*, __ U.S. __ [123 S.Ct. 1029], was made on what could be termed a "chilly," if not a "cold," record. When the jury was selected, the defendant objected to its composition but did *not* use comparative juror analysis. Two years later, after the high court's intervening decision in *Batson, supra*, 476 U.S. 79, the case was remanded to the trial court. The original prospective jurors were not present, and it is open to question how much the trial court could recall of the demeanor and body language of prospective jurors or the circumstances of the challenges. The trial court's ruling on remand was based on a cold record—the written questionnaires and the transcript of the voir dire—plus new testimony offered by the prosecutors to explain their challenges. Yet the United States Supreme Court noted no difficulty in using comparative juror analysis under those circumstances. The unhesitating use of comparative juror analysis by all Supreme Court justices in *Miller-El* is a striking contrast to the language of *People v. Arias* (1996) 13 Cal.4th 92, 136, footnote 16 [51 Cal.Rptr.2d 770, 913 P.2d 980], where this court declared that comparative juror "analysis is largely beside the point, because it ignores the legitimate subjective concerns 'that go into a lawyer's decision to select certain jurors while challenging others that appear to be similar [on the cold record].' " *Miller-El* shows that comparative jury analysis is very much on point when the trial court or the appellate court analyzes the prosecution's explanations for its peremptory challenges. Although the majority here reinterprets *Johnson, supra*, 47 Cal.3d 1194, to permit appellate consideration of comparative juror analysis when that issue was raised at

[3] I was not yet on the court in February of 1989 when it decided *Johnson, supra*, 47 Cal.3d 1194, but I followed that precedent and concurred in post-*Johnson* decisions rejecting comparative juror analysis. The United States Supreme Court's 2003 decision in *Miller-El, supra*, __ U.S. __ [123 S.Ct. 1029] has led me to reconsider the basis for this court's rejection of comparative juror analysis on appeal.

trial, it does not repudiate language from *Johnson, Arias*, at page 136, and other cases denigrating that technique—language which is not in harmony with the United States Supreme Court opinions in *Miller-El*.

The rules of appellate review are clear and simple: With certain exceptions, none applicable here, a party cannot raise on appeal an issue the party neglected to raise at trial. There is no reason to go beyond those rules to perpetuate a separate doctrine that bars a party from raising comparative juror analysis on appeal when it has not been raised at trial.

II

In *Wheeler, supra*, 22 Cal.3d 258, we used two different phrases to describe the standard for a prima facie case. We first said that the moving party "must show a *strong likelihood* that such persons are being challenged because of their group association rather than because of any specific bias." (*Id.* at p. 280, italics added.) We also said, however, that upon the presentation of the moving party's evidence, "the court must determine whether a *reasonable inference* arises that peremptory challenges are being used on the ground of group bias alone." (*Id.* at p. 281, italics added.) Later cases have debated whether these two phrases state the same standard or two different standards. (Compare *People v. Box* (2000) 23 Cal.4th 1153, 1188 [99 Cal.Rptr.2d 69, 5 P.3d 130] [same standard] with *Cooperwood v. Cambra* (9th Cir. 2001) 245 F.3d 1042, 1047; and *Wade v. Terhune* (9th Cir. 2000) 202 F.3d 1190, 1196-1197 [two different standards].)

The majority here reaffirms *People v. Box, supra*, 23 Cal.4th 1153, and holds that *Wheeler*'s "strong likelihood" and "reasonable inference" language states the same standard. But it then goes beyond *Box* to describe the standard as requiring a defendant seeking to establish a prima facie case to persuade the trial court that it is more likely than not that the prosecution's challenges had a discriminatory purpose. The correct standard, however, is that the defendant must present facts that support a reasonable *inference* of discriminatory purpose. The distinction is subtle but crucial. A defendant will often be able to present facts, such as a pattern of prosecution challenges, from which a reasonable person can infer discriminatory purpose, but it is only at the next stage, when the prosecutor explains or fails to explain the challenges, that the trial court can determine whether the challenges actually were improper. Requiring a defendant to persuade the trial court of the prosecutor's discriminatory purpose at the first *Wheeler-Batson* stage short-circuits the process, and provides inadequate protection for the defendant's right to a fair trial under the equal protection clause of the federal Constitution (*Batson, supra*, 476 U.S. at pp. 84-89 [106 S.Ct. at pp. 1718-1719]) and his right to a representative jury under the state Constitution (*Wheeler, supra*, 22 Cal.3d at pp. 276-277).

Wheeler, as I noted, used two terms—"reasonable inference" and "strong likelihood"—to define a party's initial burden. "Inference" is defined by statute; it is "a deduction of a fact that may logically and reasonably be drawn from another fact or group of facts found or otherwise established in the action." (Evid. Code, § 600.) It is presumed that the Legislature, when it enacts a law that uses a term defined in another statute, is aware of the statutory definition. (*Colmenares v. Braemer Country Club, Inc.* (2003) 29 Cal.4th 1019, 1030 [130 Cal.Rptr.2d 662, 63 P.3d 220]; *People v. Broussard* (1993) 5 Cal.4th 1067, 1080 [22 Cal.Rptr.2d 278, 856 P.2d 1134].) By the same reasoning, it should be presumed that the *Wheeler* court was cognizant of the statutory definition of "inference" when it used that term to describe the standard of proof of a prima facie case. California cases elucidate this definition: an inference "is more than a surmise or a conjecture" (*Aguimatang v. California State Lottery* (1991) 234 Cal.App.3d 769, 800 [286 Cal.Rptr. 57]) and must be based on probabilities, not possibilities (*ibid.*); "it is a reasonable deduction from the facts proved and, of course, must be logical" (*Estate of Braycovich* (1957) 153 Cal.App.2d 505, 512 [314 P.2d 767]). An inference, however, is permissive, and often a single set of facts can support multiple, conflicting inferences. (See *Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 337 [100 Cal.Rptr.2d 352, 8 P.3d 1089] ["If such evidence logically permits conflicting inferences . . ."]; *People v. Cooper* (1991) 53 Cal.3d 771, 809 [281 Cal.Rptr. 90, 809 P.2d 865] ["if the prospective juror's responses are equivocal, i.e., capable of multiple inferences . . ."]; *Pasadena Unified Sch. Dist. v. Commission on Professional Competence* (1977) 20 Cal.3d 309, 314 [142 Cal.Rptr. 439, 572 P.2d 53] ["When more than one inference can be reasonably deduced from the facts . . ."].)

"Likelihood," on the other hand, has no statutory definition. In *People v. Superior Court* (*Ghilotti*) (2002) 27 Cal.4th 888 [119 Cal.Rptr.2d 1, 44 P.3d 949], this court said it did not necessarily mean "more likely than not." (*Id.* at p. 916.) We then construed that term to describe a standard less demanding than preponderance of the evidence, holding that, consistent with the purpose of the Sexually Violent Predators Act (Welf. & Inst. Code, § 6600 et seq.), a sexual offender should be considered to be "likely" to reoffend "if he or she presents a substantial danger—that is, a serious and well-founded risk—of reoffending." (*Ghilloti, supra,* 27 Cal.4th at p. 916, italics omitted.)

If we merge the two concepts—reasonable inference and strong likelihood—we emerge with the conclusion that the defendant must show facts from which one could logically deduce that there was a substantial danger that the prosecutor's challenges were based on improper grounds. Such a test is less demanding than the majority's requirement of persuading the trial court that discriminatory purpose is more likely than not.

Although past California cases have referred to both the "reasonable inference" and "strong likelihood" standards, none required the defendant to persuade the trial court, at the first stage of a *Wheeler-Batson* proceeding, that the challenges more likely than not had a discriminatory purpose. The vast majority of decisions from other jurisdictions permit the defendant to establish a prima facie case by raising a reasonable inference of discriminatory purpose; they do not require the defendant to persuade the trial court that discriminatory intent is more likely than not.[4] The majority here cites only two decisions from other states as supporting the standard it adopts. Both offer only weak and uncertain support.

The majority first cites *State v. Gonzalez* (1988) 206 Conn. 391 [538 A.2d 210, 213], where the court said that "a defendant must establish by a preponderance of the evidence a prima facie case of purposeful discrimination." But Connecticut adhered to that rule for only a year. In 1989 the Connecticut Supreme Court, under its authority to supervise the administration of justice, abolished the prima facie case requirement and established a one-stage procedure. (*State v. Holloway* (1989) 209 Conn. 636 [553 A.2d 166, 171-172].) Quoting a decision of the South Carolina Supreme Court, the Connecticut Supreme Court said: " 'Rather than deciding on a case by case basis whether the defendant is entitled to a hearing based upon a *prima facie* showing of purposeful discrimination under the vague guidelines set forth by the United States Supreme Court, the better course to follow would be to hold a *Batson* hearing on the defendant's request whenever the defendant is a member of a cognizable racial group and the prosecutor exercises peremptory challenges to remove members of defendant's race from the venire.' " (*State v. Holloway, supra,* 553 A.2d at p. 172, fn. 4, quoting *State v. Jones* (1987) 293 S.C. 54 [358 S.E.2d 701, 703].)

The majority also cites *Stanley v. State* (1988) 313 Md. 50 [542 A.2d 267], which said that the defendant must "prove by a preponderance of the evidence that the peremptory challenges were exercised in a way that shifts the burden of production to the State." (*Id.* at p. 1277.) But *Stanley* goes on to quote a decision of the Florida Supreme Court that in evaluating a defendant's showing, " 'any doubt as to whether the complaining party has met its initial burden should be resolved in that party's favor.' " (*Ibid.*,

[4] See *Cooperwood v. Cambra, supra,* 245 F.3d at page 1046; *Jordan v. Lefevre* (2d Cir. 2000) 206 F.3d 196, 200; *Wade v. Terhune, supra,* 202 F.3d at page 1197; *Cent. Ala. Fair Housing Center v. Lowder Realty* (11th Cir. 2000) 236 F.3d 629, 636-637; *Tolbert v. Page* (9th Cir. 1999) 182 F.3d 677, 679; *Tankleff v. Senkowski* (2d Cir. 1998) 135 F.3d 235, 249; *Lahaffey v. Page* (7th Cir. 1998) 162 F.3d 481, 485; *Burks v. Borg* (9th Cir. 1994) 27 F.3d 424, 1428; *U.S. v. Johnson* (8th Cir. 1989) 873 F.2d 1137, 1140; *U.S. v. Chinchilla* (9th Cir. 1989) 874 F.2d 695, 698; *U.S. v. Chalan* (10th Cir. 1987) 812 F.2d 1302, 1314; *Valdez v. People* (Colo. 1998) 966 P.2d 587, 590.

quoting *State v. Slappy* (Fla. 1988) 522 So.2d 18, 22].) Finally, *Stanley* established a bright-line rule that the exclusion of every member of defendant's racial group established a prima facie case. (*Stanley*, at p. 1284.)

The majority derives its standard not from lower court decisions that directly address the burden of establishing a prima facie case under *Wheeler* or *Batson*, but from references in *Miller-El, supra*, __ U.S. __ [123 S.Ct. 1029], and *Batson, supra*, 476 U.S. 79, to cases under title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000e et seq.) involving alleged invidious discrimination in connection with employment. Although neither *Miller-El* nor *Batson* involved the standard for proof of a prima facie case, the majority views the high court's references as a general endorsement of title VII standards and procedures for use in evaluating *Batson* motions. And the majority asserts that in a title VII case, to establish a prima facie case, the plaintiff must prove that unlawful discrimination is more likely than not. (See maj. opn., *ante*, at pp. 1314-1315.)

The majority's analysis, however, oversimplifies and misunderstands title VII procedure. A title VII plaintiff has the ultimate burden of proving discrimination by a preponderance of the evidence, but whether a plaintiff has met that burden is assessed at the last stage in the procedure. To establish a prima facie case in the first stage, a title VII plaintiff is *not* required to show it is more likely than not that the defendant engaged in illegal discrimination. Instead, the title VII plaintiff is required to prove *facts* from which one can *infer* illegal discrimination.

In *McDonnell Douglas Corp. v. Green* (1973) 411 U.S. 792 [93 S.Ct. 1817, 36 L.Ed.2d 668], and later cases the high court said that a plaintiff alleging unlawful discrimination must, to establish a prima facie case, prove certain specific facts and actions [5] "from which one can infer, if such actions remain unexplained, that it is more likely than not that such actions were 'based on a discriminatory criterion illegal under the Act.'" (*Furnco Construction Corp. v. Waters* (1978) 438 U.S. 567, 576 [98 S.Ct. 2943, 2949, 57 L.Ed.2d 957], quoting *Teamsters v. United States* (1977) 431 U.S. 324, 358 [97 S.Ct. 1843, 1866, 52 L.Ed.2d 396].)

Texas Dept. of Community Affairs v. Burdine (1981) 450 U.S. 248 [101 S.Ct. 1089, 67 L.Ed.2d 207], a title VII case, further explained this same

[5]The specific facts and actions the plaintiff must prove to establish a prima facie case of discriminatory purpose under *McDonnell Douglas* are: "(i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications." (*McDonnell Douglas Corp. v. Green, supra*, 411 U.S. at p. 802 [93 S.Ct. at p. 1824].)

standard. It said: "The burden of establishing a prima facie case of disparate treatment is not onerous. The plaintiff must prove by a preponderance of the evidence that she applied for an available position for which she was qualified, but was rejected under circumstances which *give rise to an inference of unlawful discrimination.*" (*Burdine, supra*, 450 U.S. at p. 253 [101 S.Ct. at p. 1094], italics added, fn. omitted.)

The next major decision, *St. Mary's Honor Center v. Hicks* (1993) 509 U.S. 502 [113 S.Ct. 2742, 125 L.Ed.2d 407], addressed the question whether the trial court in a title VII action must give summary judgment for the plaintiff if the court had found a prima facie case and determined that the employer's explanation of its action was pretextual. The United States Supreme Court held that the trial court need not give judgment for the plaintiff under those circumstances. The court explained that once a plaintiff has proved facts that give rise to a prima facie case, a presumption of discriminatory purpose arises. The presumption serves the practical function of inducing the defendant to offer an explanation for its actions. (*Id.* at p. 510, fn. 3 [113 S.Ct. at pp. 2748-2749].) Once the defendant offers the explanation, the presumption disappears, and the trial court must decide whether a preponderance of the evidence shows that the employer acted with a discriminatory purpose. (*Id.* at pp. 509-510 and fn. 3 [113 S.Ct. at pp. 2748-2749].)

In *Reeves v. Sanderson Plumbing Products, Inc.* (2000) 530 U.S. 133 [120 S.Ct. 2097, 147 L.Ed.2d 105] (*Reeves*) the high court again explained title VII procedure. At issue in *Reeves* was whether the trial court must give judgment for the defendant if the plaintiff presented no additional evidence to rebut the defendant's explanation of its actions. The court said the defendant was not automatically entitled to judgment under these circumstances; instead, the trier of fact still had the duty to determine at the last stage of the procedure whether the plaintiff had proved discriminatory purpose by a preponderance of the evidence. (*Id.* at pp. 142-143 [120 S.Ct. at pp. 2105-2106].) That decision should take into account "the strength of the plaintiff's prima facie case, the probative value of the proof that the employer's explanation is false," and the other evidence, if any, presented by the parties. (*Id.* at pp. 148-149 [120 S.Ct. at p. 2109].)

The high court's insistence that the trial court determine whether a defendant acted with discriminatory purpose at the last stage, regardless of the falsity or weakness of the defendant's explanation of its actions, is consistent with its language asserting that at the first stage the plaintiff need only prove facts from which discriminatory purpose can be inferred. It would, however, be difficult to reconcile the United States Supreme Court's

position with the view of the majority here. Under the majority's view, when the trial court finds a prima facie case it necessarily finds that the plaintiff has shown it is more likely than not that the employer had a discriminatory purpose. If the employer offers no persuasive explanation, then the trial court, having already found that the plaintiff has met the burden of proof, would have to find for the plaintiff. That indeed is what the Eighth Circuit Court of Appeals held in *Hicks v. St. Mary's Honor Center* (8th Cir. 1992) 970 F.2d 487, and the high court's decision reversing the circuit court's decision (*St. Mary's Honor Center v. Hicks, supra,* 509 U.S. 502) shows that the Supreme Court does not consider a finding of a prima facie case the equivalent of a finding that the plaintiff has proved discriminatory purpose.

Gay v. Waiters' and Dairy Lunchmen's Union (9th Cir. 1982) 694 F.2d 531, a title VII case, explains in more detail the proof of a prima facie case under *McDonnell Douglas*: ". . . *McDonnell Douglas* says nothing directly about the need to prove discriminatory intent. '[T]he evident thought was that proof of the four elements warranted an inference of such intent unless the defendant presented at least some evidence in rebuttal.' *Lieberman v. Gant*, 630 F.2d 60, 63 (2d Cir. 1980) (footnote omitted). . . . [¶] Viewed in this light, the role of the *McDonnell Douglas* prima facie case is closely analogous to its role in general civil litigation: it presents the legal question whether the plaintiff has met his burden of production, coming forward with sufficient probative evidence to permit a rational jury, or court, to find the material facts in his favor, thus avoiding a directed verdict or motion for judgment as a matter of law. A prima facie case of intentional discrimination is established if the plaintiff proves facts 'from which one can infer, if such actions remain unexplained, this it is more likely than not' that the defendant's conduct was racially motivated. *Furnco Construction Corp. v. Waters*, [*supra,*] 438 U.S. 567, 576 [98 S.Ct. 2943, 2949] . . . . As an inference, it can but need not result in an ultimate judgment for the plaintiff. In other words, a prima facie case under *McDonnell Douglas* is one in which the plaintiff has met his immediate burden of production, but not necessarily his ultimate burden of persuasion." (*Gay v. Waiters' and Dairy Lunchmen's Union, supra,* 694 F.2d at p. 543, fn. 10.)

Tompkins v. State (Tex.Crim.App. 1987) 774 S.W.2d 195, 201, a *Batson* case, relied on title VII cases for the principle that: "A prima facie case represents the minimum quantum of evidence necessary to support a rational inference that the allegation of fact is true."

Guz v. Bechtel National, Inc. (2000) 24 Cal.4th 317 [100 Cal.Rptr.2d 352, 8 P.3d 1089], also described the title VII procedure. This court said that the purpose of the prima facie case requirement was "to eliminate at the outset the most patently meritless claims, as where the plaintiff is not a member of the protected class or was clearly unqualified . . . ." (*Guz,* at p. 354.) "While the plaintiff's prima facie burden is 'not onerous' [citation], he must at least show ' "actions taken by the employer from which one can infer, if such actions remain unexplained, that it is more likely than not that such actions were 'based on a [prohibited] discriminatory criterion . . . .' " ' [Citations.]" (*Id.* at p. 355.) What actions, when proved by a preponderance of the evidence, give rise to an inference of unlawful discrimination under title VII procedure? The cases answer this question; they are those actions that, *if unexplained*, permit a reasonable inference of an improper purpose or motive. (*Texas Dept. of Community Affairs v. Burdine, supra,* 450 U.S. at p. 254 [101 S.Ct. at p. 1094]; *Furnco Construction Corp. v. Waters, supra,* 438 U.S. at p. 576 [98 S.Ct. at p. 2949].) I focus on the italicized phrase, because it is here that the trial court went wrong in the case before us.

The ultimate issue raised by a *Wheeler-Batson* motion is not whether the trial judge, or an appellate court, can find a possible neutral reason why a prosecutor might want to challenge a juror, but whether the prosecutor's actual reason for the challenge was based on group bias. "[T]he trial court must determine not only that a valid reason existed but also that the reason actually prompted the prosecutor's exercise of the particular peremptory challenge." (*People v. Fuentes* (1991) 54 Cal.3d 707, 720 [286 Cal.Rptr. 792, 818 P.2d 75]; *People v. Turner* (1986) 42 Cal.3d 711, 721 [230 Cal.Rptr. 656, 726 P.2d 102].)[6]

The threshold for establishing a prima facie case should be relatively low, so that close cases are not decided at the first stage of the inquiry, but only after the trial judge has heard the prosecutor's explanations and is in a better position to determine the propriety of the challenges. In fact, this may be the common practice. This court frequently encounters cases in which the pattern of challenges suggests but does not prove discriminatory purpose and the trial judge asks for an explanation without expressly finding a strong likelihood that the challenges were improper. (See, e.g., *People v. Arias, supra,* 13 Cal.4th 92, 136; *People v. Jackson* (1996) 13 Cal.4th 1164, 1197 [56 Cal.Rptr.2d 49, 920 P.2d 1254].) At times prosecutors even volunteer an explanation without being asked. (See, e.g., *People v. Williams* (1997) 16 Cal.4th 635, 664 [66 Cal.Rptr.2d 573, 941 P.2d 752]; *People v. Howard* (1992) 1 Cal.4th 1132, 1153, fn. 3 [5 Cal.Rptr.2d 268, 824 P.2d 1315].)

[6] In title VII cases, the trial court may find for the employer defendant even if the reason it gave was a sham, if the evidence shows that the defendant gave the false explanation to conceal something other than discrimination, and had a nondiscriminatory reason for its action. (See *Reeves, supra,* 530 U.S. at p. 148 [120 S.Ct. at p. 2108].) But the nondiscriminatory reason must be the *defendant's* reason.

Establishing a low threshold for a prima facie case recognizes that the prosecutor's explanation is often critical to the decision whether the challenge was proper: just as a reasonable explanation will dispel the suspicion of group bias, "[p]roof that [an] explanation is unworthy of credence is . . . probative of intentional discrimination, and it may be quite persuasive." (*Reeves, supra,* 530 U.S. at p. 147 [120 S.Ct. at p. 2108] [title VII case].) The approach set out by the majority would, by contrast, compel trial judges to make decisions when they can only speculate as to the basis for the challenges.

Here defendant showed that the prosecutor challenged all three Blacks on the jury panel, used a disproportionate number of his peremptory challenges against members of that racial group, and failed to engage in any questioning whatever of any these prospective jurors notwithstanding invitations to do so by the trial court. With respect to two of the three jurors, there is nothing in their oral or written responses that stands out to show they would be unacceptable jurors.

Of course there still may be neutral explanations for the challenges, and if it is apparent that the prosecutor had neutral reasons for the challenges, then the pattern of challenges would not give rise to an inference of discriminatory purpose. In such cases the trial court need not find a prima facie case. (See *People v. Bittaker* (1989) 48 Cal.3d 1046, 1092 [259 Cal.Rptr. 630, 774 P.2d 659]; *People v. Howard, supra,* 1 Cal.4th 1132, 1205 (dis. opn. of Kennard, J.).) But that rule should not apply when the trial court can only speculate on the basis for the challenges. (*Howard, supra,* at p. 1207.) The prosecutor does not need to have reasonable grounds for challenging a juror; the challenge passes constitutional scrutiny if it is based on any nondiscriminatory ground. (See *Purkett v. Elem* (1995) 514 U.S. 765, 768 [115 S.Ct. 1769, 1771, 131 L.Ed.2d 834] [prosecutor did not like juror's haircut].) The ability of the trial court to find such a neutral explanation should not defeat the defendant's prima facie case when it is not apparent that the explanation was the true reason for the challenge. In the case before us, for example, the trial court said one reason for the prosecution's challenge of Prospective Juror S. E. could have been her answer to question No. 63 on the juror questionnaire. In that answer, S. E. expressed sympathy for the *victim.* Such sympathy would have been a neutral basis for a challenge, but was not an obvious basis for a prosecution challenge because a prosecutor would generally view a juror who expressed sympathy for the victim as a favorable juror. The other explanations for the prosecutor's challenges suggested by the trial court are also implausible. Thus, the pattern of prosecution challenges here created a reasonable inference of discriminatory purpose, which in the absence of any explanation from the prosecutor is not overcome by the possibility that the challenges could have been based on neutral grounds.

The trial court should have found a prima facie case and asked the prosecutor to explain the basis for the challenges. The court's failure to do so is error, and reversible per se. (See *People v. Fuentes, supra,* 54 Cal.3d at p. 715; *People v. Snow* (1987) 44 Cal.3d 216, 226-227 [242 Cal.Rptr. 477, 746 P.2d 452]; *People v. Turner, supra,* 42 Cal.3d at p. 728.)

APPENDIX C

Per Curiam

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D. C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 03–6539

JAY SHAWN JOHNSON, PETITIONER *v.* CALIFORNIA

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA

[May 3, 2004]

PER CURIAM.

We granted certiorari in this case to review a decision of the Supreme Court of California interpreting *Batson* v. *Kentucky*, 476 U. S. 79 (1986). 540 U. S. ___ (2003). The case was briefed and argued, but we now conclude that we are without jurisdiction in the matter.

The California Supreme Court reversed the California Court of Appeal's decision reversing petitioner's conviction. 30 Cal. 4th 1302, 71 P. 3d 270 (2003). The Court of Appeal held that petitioner was entitled to relief under *California* v. *Wheeler*, 22 Cal. 3d 258, 583 P. 2d 748 (1978), and *Batson* v. *Kentucky*, *supra*. 88 Cal. App. 4th 318, 105 Cal. Rptr. 2d 727 (2001). It also noted petitioner's separate evidentiary and prosecutorial misconduct claims, App. 87, but did not determine whether those claims would independently support reversal of petitioner's conviction. The California Supreme Court addressed only the *Wheeler*/*Batson* claim, and, after reversing on that ground, remanded "for further proceedings consistent with [its] opinion." 30 Cal. 4th., at 1328, 71 P. 3d, at 287.

Under 28 U. S. C. §1257, our jurisdiction is limited to review of "[f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had."

Per Curiam

In *Cox Broadcasting Corp.* v. *Cohn*, 420 U. S. 469 (1975), we described four exceptional categories of cases to be regarded as "final" on the federal issue despite the ordering of further proceedings in the lower state courts. In a post-oral-argument supplemental brief, petitioner argues that the fourth of these categories fits this case. That category involves situations:

> "where the federal issue has been finally decided in the state courts with further proceedings pending in which the party seeking review here might prevail on the merits on nonfederal grounds, thus rendering unnecessary review of the federal issue by this Court, and where reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action rather than merely controlling the nature and character of, or determining the admissibility of evidence in, the state proceedings still to come. In these circumstances, if a refusal immediately to review the state-court decision might seriously erode federal policy, the Court has entertained and decided the federal issue, which itself has been finally determined by the state courts for purposes of the state litigation." *Id.*, at 482–483.

Here, petitioner can make no convincing claim of erosion of federal policy that is not common to all decisions rejecting a defendant's *Batson* claim. The fourth category therefore does not apply. See *Florida* v. *Thomas*, 532 U. S. 774, 780 (2001). "A contrary conclusion would permit the fourth exception to swallow the rule." See *Flynt* v. *Ohio*, 451 U. S. 619, 622 (1981) *(per curiam)*.

The present case comes closest to fitting in the third *Cox* category, but ultimately falls outside of it. That category involves "those situations where the federal claim has been finally decided, with further proceedings on the merits in the state courts to come, but in which later review of the federal issue cannot be had, whatever the ultimate outcome of the case." *Cox Broadcasting, Corp., supra*, at 481. In the event that the California Court of Appeal on remand affirms the judgment of conviction, petitioner could once more seek review of his *Batson* claim in the Supreme Court of California—albeit unsuccessfully—and then seek certiorari on that claim from this Court.

Per Curiam

Compliance with the provisions of §1257 is an essential prerequisite to our deciding the merits of a case brought here under that section. It is our obligation to raise any question of such compliance on our own motion, even though counsel has not called our attention to it. See, *e.g.*, *Mansfield, C. & L. M. R. Co.* v. *Swan*, 111 U. S. 379, 384 (1884). But as the present case illustrates, we are not always successful in policing this gatekeeping function without the aid of counsel.

Part of the problem was that the California Court of Appeal's decision was certified by that court for partial publication. It addressed the *Wheeler/Batson* claim in the published portion. 88 Cal. App. 4th 318, 105 Cal. Rptr. 2d 727 (2001). In the unpublished portion, the court briefly addressed petitioner's evidentiary claims to provide guidance for the trial court on retrial, and noted that it would not address whether petitioner's objections were properly preserved or consider petitioner's prosecutorial misconduct claim. App. 58. Petitioner appended only the published portion of the California Court of Appeal's decision to his petition for a writ of certiorari. This Court's Rule 14.1(i) instructs petitioners to include, *inter alia*, any "relevant opinions . . . entered in the case" in the appendix to the petition for certiorari. The full opinion of the California Court of Appeal was not filed in this Court until the joint appendix to the briefs on the merits was filed. App. 58–112. Had the full opinion been brought to this Court's attention, it might have been more evident to us that the

Per Curiam

Supreme Court of California's decision was not final for the purposes of §1257.

A petition for certiorari must demonstrate to this Court that it has jurisdiction to review the judgment. This Court's Rule 14.1(g). And a respondent has a duty to "address any perceived misstatement of fact or law in the petition that bears on what issues properly would be before the Court if certiorari were granted." Rule 15.2. Our Rules also require that each party provide a statement for the basis of our jurisdiction in its brief on the merits. Rule 24.1(e). At all stages in this case, both parties represented that our jurisdiction was proper pursuant to §1257(a). Pet. for Cert. 1; Brief in Opposition 1; Brief for Petitioner 1; Brief for Respondent 1.

It behooves counsel for both petitioner and respondent to assure themselves that the decision for which review is sought is indeed a "[f]inal judgmen[t]" under §1257. Such attention is mandated by our Rules and will avoid the expenditure of resources of both counsel and of this Court on an abortive proceeding such as the present one.

We dismiss the case for want of jurisdiction.

It is so ordered.

APPENDIX D

COPY

Filed 8/5/04
after reversal and remand by California Supreme Court
of partially published opinion filed April 5, 2001

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 977(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 977(b). This opinion has not been certified for publication or ordered published for purposes of rule 977.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

FILED
COURT OF APPEAL FIRST APPELLATE DISTRICT
AUG - 5 2004
DIANA HERBERT, CLERK
BY _____ DEPUTY CLERK

THE PEOPLE, Plaintiff and Respondent, v. JAY SHAWN JOHNSON, Defendant and Appellant.	A085450 (Contra Costa County Super. Ct. No. 96-0691-4)
In re JAY SHAWN JOHNSON, on Habeas Corpus.	A106431

Introduction

We come to this case on remand from the California Supreme Court, following its reversal of our previous decision. Defendant Jay Shawn Johnson was convicted of second degree murder of Janika Price, the 19-month-old daughter of his girlfriend, and assault resulting in the death of a child under the age of eight (Pen. Code, §§ 187, 273ab).[1] In December 1998, defendant was sentenced to 15 years to life imprisonment on the murder conviction to run concurrently with the three-year term for corporal injury on a cohabitant.

On appeal from his conviction in the current trial, we reversed the judgment on the grounds that the trial court erred when it failed to find a prima facie case of a violation of *People v. Wheeler* (1978) 22 Cal.3d 258 (*Wheeler*) and that defendant was entitled to relief under *Wheeler* and *Batson v. Kentucky* (1986) 476 U.S. 79 (*Batson*). Justice Haerle dissented. (See *People v. Johnson* (Apr. 5, 2001, A085450).) In our previous opinion in this appeal, reversing the conviction, we also noted defendant's separate evidentiary and prosecutorial misconduct claims, but did not determine whether these would independently support reversal of the conviction. (*Id.*, typed opn. at pp. 22-29.) The California Supreme Court granted review and reversed our decision reversing defendant's conviction. (*People v. Johnson* (2003) 30 Cal.4th 1302.) It addressed only the *Wheeler/Batson* issue and remanded to this court for further proceedings. (*People v. Johnson, supra,* at p. 1328.)[2] Accordingly, with respect to defendant's *Wheeler/Batson* claim, we must conclude that the trial court did not err in finding that defendant failed to establish a prima facie case of such violation. We turn to the remaining issues in the case.

Statement of Facts

The murder victim, 19-month-old Janika Price, and her mother Jennifer Shelton were living with defendant, his three- and four-year-old sons, and his aunt Linda Green and her son. Defendant was not Janika's father. Shelton had known defendant for six or

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[1] The jury convicted defendant upon retrial after a partial reversal on his first appeal. In the first appeal (*People v. Johnson* (July 27, 1998, A076360)), we affirmed defendant's conviction of corporal injury on a cohabitant, Janika's mother Jennifer Shelton (Pen. Code, § 273.5), but reversed his convictions of second degree murder and assault on a child leading to death for error in jury instructions on the cause of death. There have been three trials in this case. The first ended in a mistrial. The second trial before Judge Westover resulted in the first appeal and is referred to by the parties as the "prior" trial. The third trial, which the parties refer to as the "current" trial, occurred in December 1998 before Judge Sepulveda, and is the subject of the instant appeal.

[2] The United States Supreme Court granted certiorari to review the California Supreme Court's decision interpreting *Batson, supra,* 476 U.S. 79. After briefing and argument in the United States Supreme Court, the court concluded it was without jurisdiction in the matter because the judgment was not final as the remaining issues had not been finally determined following remand and appellate review. (*Johnson v. California* (2004) 541 U.S. ____, No. 03-6539.)

seven months and had moved in with him, but it was not a good relationship. Defendant was physically abusive to Shelton and beat her frequently.

On February 19, 1996, defendant and Shelton argued about Janika. Shelton complained that defendant played too roughly with Janika. Defendant accused Shelton of spoiling Janika. Defendant hit Shelton in the face, kicked her in the foot, and kicked her again as she lay on the floor. When defendant left, Shelton fell asleep in the bedroom. She woke up when she heard Janika crying. The crying was unusual and sounded like Janika was hurt. A few minutes later, Shelton went into Janika's room and found her lying on her bed with her face to the wall. Shelton leaned down to kiss Janika and noticed she was pale and wheezing. Shelton asked defendant whether something was wrong with Janika. Defendant said Janika had thrown up, and he had cleaned her up and put her in bed. Shelton picked Janika up, discovered she was limp, and brought her into the living room.

Shelton called 911. In the meantime, defendant came in, picked up Janika, and gave her some water. Janika drank the water, but went limp again. Paramedic Robert Duvall arrived at 10:31 p.m., within three minutes of the 911 call. He asked what had happened, and defendant told him Janika had fallen out of her crib around 4:00 p.m. but had been fine until the 911 call. Duvall observed a bruise on Janika's forehead that was consistent with a fall. There was light bruising and some vomit on her chest. She had no blood pressure or pulse, and her pupils were fixed and dilated. Janika had been dead for at least six minutes.

Dr. Brian Peterson, who performed the autopsy on Janika, testified that the cause of death was blunt force injuries to the chest, causing the heart to rupture. Such injury would cause death within a minute or so. There could be vomiting within this period. Janika's body had other injuries, scars, and bruises that indicated a pattern of child abuse. According to Dr. Peterson, it would take a substantial amount of force, such as a hard punch or a sharp kick, to cause the heart to rupture. Dr. Peterson likened the amount of force to that which an unrestrained driver would suffer in an automobile collision at freeway speed. Accidentally stepping on the child would not have been sufficient to

cause the fatal injury.

Detective David Krastof testified that he interviewed defendant twice at the police station on February 20, after Krastof had met with Dr. Peterson. The first interview was videotaped, but only the sound portion was recorded correctly. The second interview was fully videotaped. Both tapes were played for the jury.

In his first interview, defendant initially denied having had a fight with Shelton on the night of Janika's death, but later admitted they had an argument. Defendant said nothing about hitting Shelton. Defendant said he was putting up some posters in the children's room while Janika played with his sons. Janika threw up on her bed. Defendant cleaned her up. Shelton came in, said Janika was not breathing right, and took her into the other room. Defendant claimed he performed cardiopulmonary resuscitation (CPR) on Janika after she stopped breathing, but did so by applying only light pressure. When Krastof said defendant's story did not match reports from the pathologist, defendant asked for a lawyer. Krastof placed defendant under arrest.

A few hours later, after talking to his mother, defendant said he wanted to resume talking. In this second videotaped session, defendant admitted he had a violent fight with Shelton. He dragged Shelton by her hair into the bedroom, slapped and kicked her and then went into the kids' room to clean up. When Janika threw up, defendant cleaned her face and put her down. Shelton came in a little later, picked up Janika, and noticed she was not breathing right. Defendant looked at Janika, gave her some water, and she stopped breathing. Defendant put Janika on the table, breathed into her mouth, and hammered on her chest, twice, "pretty hard."

Krastof advised defendant his story was not consistent with the medical evidence. Defendant then said he had been chasing a rat around the kids' room. While chasing the rat, he accidentally stepped on Janika's chest. He picked her up. She was screaming, but she seemed fine. She threw up right after he put her on the bed. Defendant insisted he did not kick Janika. Krastof insisted the evidence showed otherwise, and defendant eventually changed his story to say that he had accidentally kicked Janika in the chest when he backed up. Defendant said: "I did kick her. [¶] . . . [¶] I didn't know I kicked

her. I didn't know until I explained myself just now, when I jumped back." Defendant said he lied initially because he did not want to be seen as a murderer. Defendant continued to insist that his kicking Janika's chest was an accident.

Detective Krastof saw some small bruise marks on Janika's forehead. He located defendant's BB gun under a boat at a residence two houses away and fired it at the arm of another officer. Krastof testified that the marks made by the BBs on the officer's arm were similar to the marks on Janika's face.

Defendant testified in his own defense. In the early evening on February 19, 1996, he and Shelton had a fight in which he grabbed her by the hair, knocked her down, and kicked her a couple of times. He admitted that he had been violent with Shelton before. After the fight, he went into the children's room to put up some posters and clean it. All three children were there. As he moved the boys' bed, he saw a rat. Defendant put Janika on the bed and asked the boys to help him catch the rat that had run into the closet. He got a BB gun to shoot the rat. The boys shook the clothes, and the rat ran out. Defendant jumped back as the rat came toward him and he stepped on Janika. Janika screamed, and he picked her up to console her.

Several minutes later, Shelton came into the room and said Janika was not breathing right. Defendant's aunt, Linda Green, said the same thing a few minutes later. Defendant went into the living room where Shelton told him Janika was not breathing. Defendant picked up Janika and gave her some water. Janika stopped breathing and went limp. Defendant told his aunt to call an ambulance and began doing CPR. Defendant hit Janika on the chest, trying to "jump start" her heart, as he had seen it done on television. Defendant denied ever physically abusing or intentionally hurting Janika. He also denied ever shooting her with a BB gun.

Defendant's aunt Linda testified that she had heard the fight in the bedroom, had seen defendant and the boys chasing a mouse, and had previously seen mice in the apartment. She did not hear Janika cry. She confirmed that Janika was breathing "funny," that defendant gave her some water, after which Janika went limp. Defendant tried to administer CPR and hit Janika in the chest in doing so.

To dispute the timing of events provided by defense witnesses, the prosecution offered the rebuttal testimony of defendant's next-door neighbor, Terry Davidson. He heard physical fighting and a woman scream, "You killed her," "Oh my God, she's dead." The police arrived 15 to 20 minutes later.

To rebut defendant's claim that he would not let anything happen to his boys, the prosecution offered the testimony of Tammy Keller, the cousin of defendant's ex-wife. Keller testified that defendant walked in, uninvited, to the apartment she was sharing with defendant's ex-wife on August 27, 1993. He seemed very upset. When the ex-wife called, defendant got on the phone and became even more angry and started screaming, even though the boys were asleep. Defendant ignored Keller's request to lower his voice and instead proceeded to urinate in the sink on her dishes. The third time she asked him to lower his voice, he ripped the phone out of the wall. Defendant then went on a rampage. He picked up his young son and carried him like a football. While still holding the child, defendant threw a fish tank through a window, broke the glass coffee table, and tried to throw the television set out the window. Defendant bumped the child's head on the door frame and on the television set. Keller tried to stop defendant from leaving with his young son, but defendant pushed past her.

Issues on Remand

On appeal (A085450), defendant has challenged a number of evidentiary rulings and has raised claims of prosecutorial misconduct and ineffective assistance of counsel. In a related petition for habeas corpus, filed on May 11, 2004 (A106431), defendant expands upon his claim of ineffective assistance.[3] Although we briefly addressed some of the evidentiary issues in our previous opinion in this appeal in order to provide guidance to the trial court in the event of retrial, we did not determine whether objections were properly raised and preserved. Nor did we determine whether any errors found

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[3] Pursuant to our request, the Attorney General filed an informal response to the petition on June 9, 2004. (See *People v. Romero* (1994) 8 Cal.4th 728, 737; Cal. Rules of Court, rule 60.)

were prejudicial. We expressly did not address defendant's claim that the prosecutor committed misconduct by switching theories as to the instrumentality of death, because the issue did not involve an evidentiary ruling.

I.

Prosecutorial Misconduct and Ineffective Assistance of Counsel

On appeal and in the recently filed petition for habeas corpus, defendant contends that he was denied a fair trial because the prosecutor switched theories of the instrumentality of death, from a punch to a kick, between the prior trial[4] and the current trial. He argues the prosecutor committed misconduct by advancing the theory in the current trial that defendant killed Janika by kicking her. He asserts this theory was disproved by the prosecution's own witnesses at the prior trial and that the prosecutor had used that testimony at the prior trial to argue that the victim had been killed by a punch. He further contends, both on appeal and in the writ petition, that his trial counsel rendered ineffective assistance in failing to introduce prior testimony by prosecution witnesses Krastof and Dr. Peterson to the effect that a boot kick did not cause the fatal injury and in failing to either move for a mistrial or to reopen for the taking of additional evidence after closing argument to the jury began.

We find no misconduct by the prosecutor and no prima facie case of ineffective assistance by defense counsel.

A. Prosecutorial misconduct claim

Defendant cites no authority that a switch in theory between trials as to the instrumentality of death constitutes prosecutorial misconduct and we have found none. Rather, defendant contends the prosecutor offered false evidence and misled the jury as to the forensic and medical facts relating to the manner of Janika's death. He builds his argument upon the American Bar Association Standards for Criminal Justice Prosecution

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[4] Upon defendant's request, we take judicial notice of the record in the prior appeal (*People v. Johnson, supra*, A076360). (Evid. Code, §§ 451, 452.)

Function and Defense Function (3d ed. 1993) (ABA Standards) and accompanying commentary. These provide in relevant part:

"Standard 3-5.6 Presentation of Evidence: [¶] (a) A prosecutor should not knowingly offer false evidence . . . ." (ABA Standards, *supra*, at p. 100.)

"Standard 3-5.8 Argument to the Jury: [¶] (a) In closing argument to the jury . . . the prosecutor should not intentionally misstate the evidence or mislead the jury as to the inferences it may draw." (ABA Standards, *supra*, at p. 106.)

"Commentary: [¶] . . . Prosecutorial conduct in argument is a matter of special concern because of the possibility that the jury will give special weight to the prosecutor's arguments, not only because of the prestige associated with the prosecutor's office, but also because of the fact-finding facilities presumably available to the office." (ABA Standards, *supra*, com. to std. 3-5.8, at p. 107.)

Defendant premises his claim of prosecutorial misconduct upon the prosecutor's supposed switch in theory between the prior and current trials as to the cause of Janika's death—from a punch to a kick—which he claims misled the jury and "misstate[d] undisputed medical or forensic facts." Defendant argues that testimony by prosecution witnesses Krastof and Dr. Peterson in the prior trial "totally disproved any kicking theory"; that the prosecutor "omitted to adduce" and "deliberately withheld" prior testimony by the two, which "fully contradicted the theory that [defendant] kicked Janika to death"; that the prosecutor "argued a factual theory which the prosecutor's own witnesses had totally disproved at the prior trial."

The invalid premise of defendant's argument is that the kicking theory had been "totally disproved by the sworn statements of [the prosecution's] own police and expert witnesses" at the prior trial. At most, the prosecutor changed his emphasis between the two trials as to how defendant killed Janika. At both the prior trial and at the current trial, Dr. Peterson testified that the right atrium of the heart had been ruptured by a "blunt force" trauma. At both trials, Dr. Peterson consistently testified that the best analogy for the force of the blow to the chest was of injuries to adults involved in highway speed car accidents while not wearing seat belts or shoulder harnesses who were thrown against the

steering wheels. "Blunt force simply means a blunt object was used to apply this force to the body." Moreover, at the prior trial, Dr. Peterson testified that *he could not say with certainty* whether a punch or a kick to the chest was the source of the blow that caused Janika's heart to rupture.[5] Regarding the absence of a definitive mark on the chest, when

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[5] In the prior trial, Dr. Peterson testified: "Now there were no specific patterns on this little girl's body that I could associate with a shaped object. There was no shape of a led [*sic*] pipe. There was no shape of a wrench. There was no particular imprints that was suggestive of knuckles, for example. [¶] So by using the term 'blunt force,' I simply mean that significant force was applied to the chest but in a vague sort of way so as not to leave a pattern. [¶] *And any number of types of force application could have caused that.*" (Italics added.)

Peterson had no doubt that Janika was killed or injured due to abuse. On cross-examination at the prior trial, Peterson again testified that he had found no patterns on the skin. Asked whether it was correct that "[i]f someone was to punch a child, you would see an indicator force of fists or knuckles," Peterson replied, "Commonly not, no. It's—it must have something to do with children. The tissues are quite flexible." He testified he had never seen a specific shaped pattern on the abdomen of a child who had been killed by a blow to the abdomen. Nevertheless, a signature force or application pattern was "something we always look for. It's a nice thing to find. If you can find something that matches an object and you can tell the police to look for that object, that's a helpful thing. [¶] So it's one of those features that it's nice if you have it. *Normally you don't have it, particularly on children.*" (Italics added.)

Peterson also was cross-examined regarding the type of surface needed to cause the fatal heart injury.

"Q. . . . [W]hat surface would be needed to cause the atrium destruction that you referred to?

"A. . . . [T]he issue was that there [were] some things that were not there. There was not a bruise to the skin over the breastbone. There was not a fracture of the bone. There was no bleeding inside the muscle. So I don't think it was a point force like the end of a rod or something like that. It was a relatively wider force. *But that could have been a lot of things. It could have been the sole of a foot. It could have been a fist or a wall. It could have been any number of things that were sufficiently wide not to leave a pattern, but sufficiently small to focus force on the heart and rupture it.*" (Italics added.)

"Q. Okay. You also said it could have been the area of a hand, correct?

"A. Yes.

"Q. *But you also said it wouldn't have been a narrow area like a toe; is that correct?*

asked by defense counsel at the current trial whether a kick to the chest with pointy toed boots could cause the particular kind of injury or make a signature mark suggesting that it was a particular kind of boot, the doctor replied: "my answer is always going to be, it

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"A. *Well, I did not see a pattern consistent with that. Could an injury from the toe have been applied and not leave a pattern? I don't think so. But I guess almost anything could happen.* (Italics added.)

"Q. Let's assume a person was wearing a hiking boot with a very defined rounded edge, a tip, okay? Would that area be consistent with the narrow sort of force you're referring to leaving a U or a signature application upon the chest?

"A. Well, I believe that's two separate questions. [¶] *Could that type of force cause this injury? Most certainly.* [¶] *Did I think that it did? No, because there was no such pattern.* (Italics added.)

"Q. Okay. The key question then is you did not see any pattern consistent with the edge of a boot hitting the child chest, correct?

"A. That's correct."

Asked how the abdominal and chest injuries occurred, Dr. Peterson answered:

"A. [¶] . . . [¶] In terms of injuries, my opinion is that more than likely the child was punched in the abdomen on more than one occasion to account for the older and newer bleeding inside the mesentery. [¶] *As far as the chest injury goes, I can see that happening any number of ways.* I suspect if somebody is willing to punch a . . . child in the stomach, someone could also be willing to punch a child in the chest and that could account for the injury there." (Italics added.)

In discussing the older injury to the abdomen, Dr. Peterson opined that the child had been punched hard enough in the abdomen on more than one occasion to cause the bleeding in the mesentery and perhaps also the microscopic perforation in the bowel. He agreed that a punch was the most likely force to cause the abdominal injuries. Asked whether he was "able to distinguish a punch causing [the abdominal injuries] or could [it] have been a kick, a fall or anything like that to the abdomen area," Dr. Peterson answered: *"It was not a fall. This was inflicted. What I can say for sure is that, again, similar to the chest injury, there was no pattern on the skin. So it could have been a kick. But, again, I did not see a shoe pattern or a sole pattern.* [¶] *Could it have been a punch? Absolutely. An elbow? Sure. Because there was no pattern, I can tell you what wasn't there. But it's harder to say what it must have been. I can tell . . . you what it may have been.*" (Italics added.)

On redirect at the prior trial, the prosecutor showed Dr. Peterson the boot defendant had been wearing that day and asked, "Looking at this shoe, would the injury to the chest, if it was kicked with the top of the tip area like that, would that have been a cause of some of the injuries you observed?" Dr. Peterson answered: *"I guess it could have. Again, I didn't see any specific pattern on the chest. I don't believe that the tip of that shoe would have caused a fatal injury. . . ."* (Italics added.)

depends. . . . [¶] Can I envision a specific type of boot leaving a type of pattern? Absolutely. Can I envision not leaving a mark? Absolutely."

However, Dr. Patterson consistently maintained at both trials that the blow was inconsistent with the type of accidental injury claimed by defendant, whether from defendant's accidentally stepping on Janika during defendant's pursuit of the mouse or from the defendant's negligent application of CPR. Nor would a rapid compression of the palm area cause the same kind of compression as the blunt force trauma that occurred here.

At the prior trial, Krastof testified that the brown and green hiking shoes recovered from defendant's house were dirty and that he saw no dirt, footprints, or other marks consistent with marks left by the shoe on the t-shirt Janika had been wearing. No such testimony was elicited by the defense or the prosecution at the current trial. However, defendant did identify the boots (exhibit No. 20) during cross-examination by the prosecutor, but stated they were much dirtier than they had been on the day he kicked Shelton and stepped on Janika. Moreover, at the current trial, defendant testified that, after he stepped on Janika, she threw up and he cleaned up the mess. Shelton also testified that defendant told her that Janika had gotten sick, thrown up, and that he had cleaned her up and put her to bed. The jury could certainly infer that defendant's cleaning up of Janika following her vomiting had included changing her t-shirt.

We conclude that, contrary to defendant's claim, evidence at the prior trial did not *exclude* the possibility that a kick had caused the blunt force trauma that killed Janika. Indeed, in argument at the prior trial, the prosecutor acknowledged that an intentional kick could have caused the fatal injury.[6]

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[6] At the prior trial, the prosecutor referred to the various kinds of abuse suffered by Janika, including being "kicked," "stomped" and "punched." He also argued with respect to defendant's failure to tell the authorities that he had kicked Janika: "What about the kicks? I forgot about the kicks. You forget about the kicks. You kick a child so hard all the air comes out of it; the child throws up; the child is crying and you're sitting there saying, according to your testimony, daddy is sorry. Daddy is sorry. You forget this? Later on the kid stops breathing and this skips your mind? You don't

Nor did the prosecutor's closing argument at the current trial misstate "undisputed medical or forensic facts" as argued by defendant. The prosecutor argued that the child was already dead during defendant's attempt to administer CPR, that the force necessary to cause the injury was not consistent with "that kind of punch" and that it was a "force more consistent with a foot than a fist." Nevertheless, although arguing that defendant kicked Janika to death, the prosecutor acknowledged the possibility that an intentional punch could have been the means of inflicting the trauma. During his final closing argument, the prosecutor argued that defendant had not accidentally stepped on Janika, stating: "I don't care how you look at it. You want to go with the kick, fine. *You want to go with the punch, fine.*" (Italics added.)

Nor did the prosecution's change of emphasis during the current trial unfairly "surprise" the defense. During pretrial hearings, the prosecution unsuccessfully sought to bring character evidence into it's case-in-chief regarding defendant's modus operandi of kicking when angered. The prosecutor contended that defendant's use of his foot was "the trademark" or a "signature." The prosecutor argued, "And [when defendant] feels that he is provoked, his response [is] to use violence and in a manner particularly of kicking." Defense counsel countered that defendant's kicking Shelton in the foot and nowhere else was not sufficiently connected with the method of death of Janika as "[t]here is no testimony that she [Shelton] was kicked in the torso or stomped on the chest." Defense counsel at that point recalled that in the prior trial he had tried to present

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remember that." With respect to the assault instruction, he argued, "In this case, since the child was struck, we know he had the ability. We know the kid was hit by the defendant. We know he assaulted the child. There was no justification for punching the child in the stomach a couple of days before. *There was no justification for stomping on the kid or kicking the kid while they was* [*sic*] *in the bedroom.* There was no justification about this alleged CPR." (Italics added.) At the prior trial, the prosecutor argued that the punch to Janika's abdomen, occurring a few days before the blow to the chest, would have proved fatal. He also argued that defendant lied when he said "he never hit the kid, never stepped on the kid. No evidence of that? Yeah, there is. The kid suffered these injuries." He also argued that defendant's claims to have accidentally kicked Janika while trying to catch the mouse and to have injured Janika while performing CPR were unbelievable.

through Dr. Peterson evidence of defendant's foot on Janika. "It's my recollection that Doctor Peterson—one of the things I actually was trying to present was the act of the foot by Mr. Johnson on the child's baby (sic). The detective and the Coroner said no foot imprints [were] placed on the child. The baby was wearing a white or clean T-shirt. [¶] And that the detective, when he collected evidence of . . . Johnson's boots, they were very dirty. There were no footprints or none of this left on the child's shirt to suggest that he used his foot to—to kick this child. [¶] So I find it somewhat ironic now on the third trial the People are trying to present a sort of inconsistent argument to get into domestic violence. Mr. Johnson, who kicked Jennifer Shelton in the foot is supposedly to have used a boot that was supposedly dirty to kick the child when the prosecution witnesses came in to argue contrary to that point of view."

The trial court ruled at that point under Evidence Code section 352 that it would not allow the prosecution to introduce into its case-in-chief "that defendant has an M.O. of kicking people."

At a later point in the pretrial hearings, the court acknowledged that our opinion on the appeal of the prior trial had eliminated the blow to Janika's stomach as a possible cause of death, leaving the possible causes "C.P.R. versus kicking. I guess we might have that. Was it a blow to the chest, a kick? We'll take that up later. [¶] As far as . . . the earlier blow to the stomach versus whatever happened to the chest, the Court of Appeal decided that issue about the stomach blow at least. And we'll take up the other issues after the evidence goes in." Defendant was not and could not have been surprised by the prosecutor's change in emphasis at trial from a punch to a kick.

We find no prosecutorial misconduct.

B. Ineffective assistance claim

Defendant argues on appeal and in his related habeas petition that trial counsel was ineffective when counsel initially failed to introduce the prior testimony of Krastof and Dr. Peterson that a boot kick did not cause the fatal injury and that defense counsel was ineffective in failing either to move for a mistrial when surprised by the prosecutor's switch of theory or to move to reopen for the taking of evidence after jury argument

began. We note that defendant was represented by the same counsel at both the prior trial and the current trial.

1. Standard of review

Both the federal and California Constitutions guarantee the right to effective assistance of counsel. (*People v. Ledesma* (1987) 43 Cal.3d 171, 215.) Defendant carries the burden of rebutting, by a preponderance of the evidence, a presumption that he received effective assistance. (*People v. Garrison* (1989) 47 Cal.3d 746, 788.) The claim of ineffective assistance of counsel involves two components: (1) defendant must show that counsel's performance was deficient, and (2) defendant must establish prejudice. (*Id.* at p. 786; *People v. Ledesma,* at pp. 216-217.)

To be deficient, counsel's performance must have fallen " 'below an objective standard of reasonableness . . . under prevailing professional norms.' [Citations.]" (*People v. Ledesma, supra*, 43 Cal.3d at p. 216.) In applying this prong of the test, courts must exercise deferential scrutiny so as to avoid the dangers of " 'second-guessing.' " (*Ibid.*)

Further, except in circumstances not here relevant, prejudice must be affirmatively proved. "[T]o be entitled to reversal of a judgment on grounds that counsel did not provide constitutionally adequate assistance, the petitioner must carry his burden of proving prejudice as a 'demonstrable reality,' not simply speculation as to the effect of the errors or omissions of counsel." (*People v. Williams* (1988) 44 Cal.3d 883, 937.) " 'The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.' " (*People v. Ledesma, supra,* 43 Cal.3d at pp. 217-218.)

"Because a petition for writ of habeas corpus seeks to collaterally attack a presumptively final criminal judgment, the petitioner bears a heavy burden initially to *plead* sufficient grounds for relief, and then later to *prove* them." (*People v. Duvall* (1995) 9 Cal.4th 464, 474.) If the petitioner fails to allege facts that, if true, would entitle

him to relief, no prima facie case has been stated and the petition may be summarily denied. (*Id.* at pp. 474-475.)

2. *Evidence in support of petition*

Because we review defendant's claim pursuant to a habeas petition, our review is not confined to the appellate record. (See, e.g., *People v. Ledesma, supra,* 43 Cal.3d at pp. 218-219; *People v. Gutierrez* (1993) 14 Cal.App.4th 1425, 1438.) Defendant has submitted only the declaration of his appellate counsel, Stephen B. Bedrick, in support of his petition. Appellate counsel relates that defendant's trial counsel Patrick Cannon refused to provide a signed, written declaration in support of the habeas petition. Appellate counsel then relates that trial counsel told appellate counsel that: (1) trial counsel did not realize that the prosecutor had switched theories between trials; (2) trial counsel had spoken with Dr. Peterson before the current trial and thought Dr. Peterson's testimony was going to be the same at the current trial as it had been at the prior trial; (3) trial counsel did not realize during the current trial that Dr. Peterson's testimony was different from his testimony at the prior trial; and (4) trial counsel does not respond to opposing counsel's comments, because they are not evidence. Appellate counsel therefore opines that trial counsel had no valid tactic or strategy for failing to bring out evidence that would have disproved the prosecution's theory that death occurred by kicking.

As the Attorney General points out, the declaration of appellate counsel is "riddled with inadmissible evidence." Specifically, appellate counsel's statements setting forth what trial counsel said to him are entirely inadmissible hearsay. (*People v. Madaris* (1981) 122 Cal.App.3d 234, 242, disapproved on other grounds in *People v. Barrick* (1982) 33 Cal.3d 115, 127; see *In re Fields* (1990) 51 Cal.3d 1063, 1070.) "It has long been the rule of California that factual allegations on which a petition for habeas corpus are based must be 'in such form that perjury may be assigned upon the allegations if they are false.' (*Ex parte Walpole* (1890) 84 Cal. 584.) Here the critical allegations were patently not in such form." (*People v. Madaris, supra,* 122 Cal.App.3d at p. 242.)

In any event, neither the declaration nor the appellate record in this case establish a prima facie case of ineffective assistance.

Were we to consider trial counsel's statements to appellate counsel, they indicate to us that defense counsel did not view the evidence or the prosecutor's argument as involving a radical shift in theory. We have reached the same conclusion with respect to the prosecutorial misconduct claim above. The shift in emphasis was not a major and significant change in theory, as speculated by appellate counsel. The central theory of the prosecution was the evidence that death was caused by an intentional blow to the chest by a blunt force. Whether the blow was from a kick or a punch was ultimately not knowable from the forensic evidence.

Moreover, the record itself shows that defense counsel was well aware of the prosecutor's shift in emphasis. As we have discussed above, counsel was not "surprised" by the prosecutor' switch in emphasis from the theory at the prior trial that the fatal blow was a punch either to Janika's chest (that evening) or to her abdomen (a day or two before her death), to the theory at the current trial that the fatal blow was a sharp kick to her chest. This indicates a tactical decision by trial counsel to refrain from cross-examining Dr. Peterson regarding his opinion at the prior trial that the fatal blow was probably not a sharp kick with the toe of a boot, and to forego cross-examining Officer Krastof regarding defendant's dirty boots and the lack of dirt marks on the t-shirt Janika was wearing.

Defense counsel argued, in the current trial, that defendant was not guilty of second degree murder as defendant had no intent to kill Janika when he either accidentally stepped on her and/or when he incorrectly administered CPR. Defense counsel contended that at most defendant was guilty of involuntary manslaughter. Counsel relied upon defendant's testimony that defendant was startled by a mouse, jumped back and accidentally stomped on Janika and, when Janika began having difficulty breathing, that defendant incorrectly gave her CPR by "rather stupidly" hitting her in the chest to try to revive her.

Given that a key part of the defense was defendant's story about accidentally stepping on Janika during pursuit of the mouse, the lack of a boot imprint or a dirty t-shirt could serve to highlight the likely falsity of that defense. Furthermore, defense counsel did ask Dr. Peterson at the current trial about the likelihood that a pointy-toed boot would leave a mark and the doctor testified that such a blow might leave a mark and might not. In addition, the boots *were* introduced into evidence during defendant's testimony and he stated they were "dirtier" than they had been the night Janika was killed. There was no need to cross-examine Krastof regarding them.

A fortiori, given the likely tactical decision not to undermine defendant's story that he accidentally stepped on or kicked Janika by eliciting testimony that a kick was less likely the cause of death than a punch, and the fact defendant was not surprised by the prosecutor's emphasis on a kick, defense counsel's failure to move for a mistrial or to move for reopening of evidence upon the prosecutor's argument was a reasonable tactical choice.

In any event, defendant has not carried his burden of establishing prejudice from any claimed ineffective assistance as a demonstrable reality. The evidence showed that a sharp blow to the chest—either a punch or a kick—caused Janika's death. Had defense counsel tried to impeach Dr. Peterson with his prior testimony that he had not seen an injury consistent with a kick from the boot toe and that he thought such a blow would leave a pattern, the prosecution would doubtless have introduced Dr. Peterson's qualifying remarks at the prior trial that "almost anything could happen" and that that type of force "[m]ost certainly" could have caused this injury, and his overall recognition that it "could have been a lot of things. It could have been the sole of a foot. It could have been a fist or a wall. It could have been any number of things that were sufficiently wide not to leave a pattern, but sufficiently small to focus force on the heart and rupture it." Such a blow was inconsistent with defendant's accidentally stepping on Janika and with the application of CPR by defendant. The jury necessarily found defendant was not credible and that he had killed Janika with malice.

Defendant has failed to state a prima facie case of ineffective assistance of counsel.

II.

The Videotaped Interviews

Defendant next contends on appeal that the trial court erred in admitting lay opinions of Police Officers Krastof and Cope contained in the videotapes of their two interviews with defendant, during which they repeatedly stated their opinions that defendant was lying. In our previous opinion in this appeal, we stated: "A police officer's personal opinion regarding the credibility of an interviewee generally is inadmissible either as lay testimony or as expert testimony and should have been redacted upon proper objection. (*People v. Melton* (1988) 44 Cal.3d 713, 744; *People v. Smith* (1989) 214 Cal.App.3d 904, 915-916; *People v. Sergill* (1982) 138 Cal.App.3d 34, 40.)" (*People v. Johnson, supra*, A085450, typed opn. at pp. 26-27.)

The parties dispute whether the error was waived by defense counsel who, despite raising objections to the officers' opinions on the tape before it was played, never sought to redact specific parts of the officers' opinions when given the opportunity to do so by the court. Before the first interview tape was played for the jury, defense counsel objected only to the reference to acts of domestic violence against other individuals, which objection was sustained. The court then inquired whether defense counsel had other objections, asking: "Mr. Cannon, are you satisfied now? Have you gone through the transcript and you're satisfied there's nothing else that you want taken out?" Defense counsel replied, "I'm hoping not." The court also urged defense counsel to review "the next tape to make sure that everything is redacted that's supposed to be." The next day, the court sought to confirm that defense counsel had "had an opportunity to go through the second tape of the Defendant's statement to the police." Defense counsel acknowledged that he had and when asked whether it was "properly redacted," defense counsel confirmed, "It's acceptable, Your Honor." At no point in either discussion with the court did defense counsel object to the statements defendant now challenges, nor alert the court to his previously expressed concerns and seek a final ruling on the matter.

Clearly, the claim was waived. (Evid. Code, § 353; *People v. Rowland* (1992) 4 Cal.4th 238, 259 [waiver by failure to secure a ruling].)

In any event, and to forestall a claim of incompetence of counsel, we also conclude that the error in failing to fully redact the tape of the officers' opinions that defendant was lying was necessarily harmless. Defendant was certainly lying to the officers and both in the second videotaped interview and at trial he admitted that he had done so. At trial he repeatedly admitted he had lied to the police and to the jury in his previous trials.[7] Neither officer was asked at trial to opine on defendant's veracity.

Given the overwhelming evidence that defendant had, in fact, lied repeatedly about the circumstances surrounding Janika's death in a myriad of respects, the officers'

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[7] For example, defendant admitted on the stand that he had "lied about a lot of things"; he admitted having lied to this jury about having fed the children breakfast on the morning of Janika's death; he admitted having lied under oath at the prior trial when he testified he did not kick Shelton and that he had not knocked her down immediately before Janika's death. Defendant admitted having lied to the police officer at the taped interview about not having kicked Shelton. He admitted having lied to the officers about beating up on Shelton and knocking her down. He did so in order to protect himself and because he was scared. Defendant admitted having lied at the prior trial about whether he had told the officers he had kicked Shelton; he admitted that he had lied to protect himself and that he "[would] lie today to protect [his] honor." Defendant admitted having lied to the police during the first videotaped interview about having stepped on Janika. He admitted lying to the officers when he told them he never hurt anybody before. He admitted lying to the police about the manner in which the child had been injured. He admitted lying to the police during the first interview tape when he demonstrated to the police officers that he lightly pushed on Janika's stomach as a form of CPR. He lied when he told the police he had called 911 and that he had called an ambulance, when in fact he had not called the ambulance and had told the other adults present not to call 911. At the current trial, defendant denied having had training in CPR. He was impeached by prior testimony and his admission that he was taught how to do CPR in high school. He admitted having lied to the police officers about the argument he had had with Shelton that led to his beating her up, telling them it was over gas for the car and diapers, when in fact the argument was over his mistreatment of Janika. He admitted he had not testified truthfully at the prior trial about a previous occasion when Janika became unconscious while alone in his care, when he testified that the door to the room they were in was locked because a friend had locked it upon leaving. In fact the door could only be locked from the inside.

expressions of opinion in the taped interviews that they believed defendant was lying added little to the evidence the jury heard. It is not reasonably probable that their opinions during the interviews that defendant was lying prejudiced defendant or that redaction of their opinions from the tape would have led to a result more favorable to defendant. (*People v. Melton, supra,* 44 Cal.3d at p. 745; *People v. Smith, supra,* 214 Cal.App.3d at pp. 915-916.) Clearly, the error did not alter the outcome of the trial and, thus, does not warrant reversal. (Cal. Const., art. VI, § 13; Evid. Code, § 353.)

III.

Impeachment of Jennifer Shelton

Defendant contends that the trial court erred in allowing testimony by Shelton that defendant had physically assaulted her "frequently"—on average once a week—during the six to seven months of their relationship. In our prior opinion in this appeal, we concluded that admission of this testimony was error, reasoning: "Defendant moved to exclude testimony by Jennifer Shelton as to his prior acts of domestic violence on her because the current trial pertained only to the death of Janika Price. He was convicted in the prior trial of battery on Jennifer Shelton based on the beating he inflicted immediately before Janika's death. The trial court, however, ruled that the evidence of prior abuse would be admissible to explain why Shelton changed her testimony between the preliminary examination and the first two trials.

"Shelton testified on direct examination at the current trial as follows: [Defendant] had physically assaulted her about once a week during the six or seven months they lived together. When she testified at the preliminary examination, her testimony, which was supportive of [defendant], was not totally truthful because she did not believe that [defendant] could do something that 'hateful.' She further testified that [defendant] had a 'temper.'

"[Defendant] correctly contends that this evidence was inadmissible on the ground stated. Reference to Shelton's preliminary hearing testimony was inadmissible hearsay. It was not admissible under Evidence Code section 1235 as a prior inconsistent statement because there was no inconsistency. Shelton admitted in her testimony at the current trial

that her preliminary hearing testimony was false. Thus, it would only have been admissible as a prior consistent statement under Evidence Code section 1236 if her credibility had been challenged, which it had not. (Evid. Code, §§ 1236, 791.) It was improper bootstrapping to introduce the otherwise inadmissible history of domestic violence for the purpose of explaining Shelton's preliminary hearing testimony which was inadmissible and irrelevant." (*People v. Johnson, supra*, A085450, typed opn. at p. 26.)

Although we have concluded this evidence was erroneously admitted, defendant has failed to demonstrate prejudice in the circumstances presented here. Shelton's testimony about past abuse was brief and without details. In contrast, properly admitted evidence of defendant's abuse of Shelton immediately before he killed Janika was graphically detailed and showed considerable brutality by defendant. That beating resulted from their argument over defendant's mistreatment of Janika and culminated in his kicking Shelton, knocking her down and kicking her again while she lay on the floor. The risk that the jury would conclude that defendant "was a bad man, and that he beat Janika in the same way that he beat her mother," was far more likely attributable to that detailed and graphic evidence than to Shelton's brief and general testimony that defendant had frequently abused her in the past.

Although the court allowed the jury to rely on the unspecified abuse as misdemeanor conduct bearing upon defendant's credibility as permitted by *People v. Wheeler* (1992) 4 Cal.4th 284, 290, that use of this evidence also paled in significance in light of evidence of defendant's *felony* conviction, which was properly admitted, and of his numerous admitted lies.

On the record here, we are convinced that it is not reasonably probable that exclusion of Shelton's testimony that defendant had repeatedly abused her in the past would have led to a result more favorable to defendant.

IV.

Testimony of Tammy Keller

We next address the prejudicial impact of the trial court's erroneous admission of evidence regarding defendant's trashing of his ex-wife's apartment two and one-half years before he killed Janika. We described the evidence and our conclusion that its admission was erroneous in our prior opinion in this appeal as follows:

"[Defendant] contends that the court erred in allowing Tammy Keller to testify on rebuttal about his trashing his ex-wife's apartment. Keller was the cousin of [defendant's] ex-wife, Holly Eastman, who was the mother of [defendant's] two sons. She testified that she was living with Holly and her two children on August 27, 1993, when [defendant] came over while Holly was not there. [Defendant] spoke to Holly on the telephone and argued with her. After that, [defendant] went on a rampage. He ripped the telephone out of the wall and urinated on the dirty dishes in the kitchen sink. [Defendant] picked up his son and carried him under his arm. He threw a fish tank through the window, broke the glass coffee table, and tried to throw the television through the window. During the course of this, [defendant] accidentally bumped the child's head on the door and on the television.

"The trial court ruled that Keller's testimony was admissible to impeach [defendant's] testimony that '[my two boys] knew I'm not going to let nothing happen to them. Any time they with they daddy, they know they're protected.' We agree with [defendant] that the evidence should have been excluded under Evidence Code sections 352 and 1101 in that its minor probative value was far outweighed by the prejudicial effect." (*People v. Johnson, supra*, A085450, typed opn. at pp. 27-28.)

Nevertheless, in light of the record as a whole, we believe the admission of this evidence did not result in a miscarriage of justice requiring reversal of the judgment.

As a threshold matter, we address the Attorney General's claim that defendant waived any error. Defense counsel successfully objected to the admission of all evidence concerning this incident during the prosecution's case-in-chief. He also argued against it's introduction on rebuttal, contending that defendant did not "open the door" by his

assertion that his sons knew they were protected when they were with him. Defense counsel further argued that, "[s]hould the court conclude [defendant] did open the door, . . . this information should be limited as to what can come in. . . ." He urged the court to "limit it . . . to the accounts or narrations concerning the child and not all of the other extraneous [Evidence Code section] 352 issues such as what Ms. Keller did to try and get the child back, being dragged down the road, because that defeats the purpose of this evidence being introduced in the first place. [¶] . . . [I]t's being introduced or asked to be introduced as it relates to the child and not Ms. Keller." The court agreed, ruling that the testimony would be limited "to testimony relating to what happened to the child." It ruled that Keller "can testify as to what happened to the child. She may not testify as to assaultive behavior as to her or her holding onto the car as he's driving away." In light of this ruling, it appears that counsel should have objected again when the prosecutor elicited evidence of events at the apartment before defendant actually grabbed his son. Nevertheless, it appears the parties understood the ruling to mean that evidence up to the point of Keller's chasing the car was to be admitted. In any event, we need not determine whether counsel waived objection to testimony as we have determined, in light of the entire record, that admission of Keller's testimony does not require reversal.

We have concluded that introduction of the entire version of what happened at the Keller apartment was error under Evidence Code sections 352 and 1101, because it was more prejudicial than probative. As recognized by the trial court when it refused to allow this evidence to be presented in the prosecutor's case-in-chief, such evidence is generally very prejudicial. Nevertheless, admission of a more limited version of this testimony would have been proper. Defendant admitted that he had "accidentally stepped on" his kids when they were underfoot. Asked how many times this had happened, he testified: "I don't know. Bumped into 'em a couple of times. I turn around and if I'm going out the door and I turn back around, they're right there on me trying to follow me. I mean, ain't like I did it on purpose or nothing. I just turned around." Keller's rebuttal testimony that defendant had come to her home where his sons were sleeping, and in an angry state grabbed his oldest son and "carried him like a football with his head in the

front," "knocked [the child's] head into the door frame" while trying to pass from the bedroom into the living room where he tried to throw the television set through the window, once again hitting the boy's head with the television at which point the boy stopped crying and closed his eyes, would have sufficed to rebut defendant's testimony without including the more inflammatory parts of the incident.

Immediately following Keller's testimony, the trial court read the following admonition: "[Y]ou just heard testimony with regard to the Defendant's treatment of his own children. That is being received to rebut his testimony with regard to his behavior toward his own children. All of this type of evidence . . . is not being received to show the Defendant is a person of bad character or has a propensity to commit crimes. It may be considered for the limited purposes for which it was received and no other purposes.

The jury was also instructed that other crimes evidence "may not be considered by you to prove that the Defendant is a person of bad character or that he has a disposition to commit crimes. It may be considered by you only for the limited purpose of determining if it tends to show: [¶] . . . [¶] Acts of violence toward his own children, including the testimony of Ms. Keller regarding [defendant's older son] to rebut the Defendant's testimony regarding his behavior toward his own children. [¶] For the limited purpose for which you may consider such evidence, you must weigh it in the same manner as you do all other evidence in this case. You are not to consider [it] for any other purpose."

The sole instance cited by defendant of the prosecutor referring to Keller's testimony during argument is in the context of the prosecutor's pointing out defendant's numerous lies: "It's a lie, just like the lie he told about his kids. 'My kids know I would never hurt them.' Really? Taking your kid and tossing him around and smacking his head, tossing up a television and knocking a kid in the head." This brief and limited reference to Keller's testimony stayed well within the limits of that evidence, which we have concluded would have properly been admissible on rebuttal. Although defendant argues the prosecutor did not tell the jury they should limit this evidence to credibility, and should not use it to judge defendant's character, the prosecutor was not required to do so. The judge twice had instructed the jury that it must limit its consideration of the

testimony "to rebut [his] testimony regarding his behavior toward his own children" and not to show him to be a person of bad character. The prosecutor properly limited his reference to Keller's testimony to challenge defendant's credibility regarding his treatment of his children.

Defendant has failed to prove that admission of this testimony resulted in a miscarriage of justice or that it was reasonably probable that but for its admission he would have received a more favorable result (*People v. Watson* (1956) 46 Cal.2d 818, 836), given that some limited testimony regarding this incident and defendant's knocking of his son's head against the door frame and against the television set as he tried to throw it out the window properly could have been admitted, that the jury was twice admonished that it could properly consider the evidence only to rebut defendant's testimony about his treatment of his own children, and that the prosecutor limited his use of the evidence to that which was properly admissible.

The strong forensic evidence that Janika was killed by an intentional and forceful blow to the chest, that she was the victim of child abuse, that the blow could not have been from defendant's accidentally stepping on her or from CPR, combined with other evidence of defendant's explosive violence toward Shelton on the night in question and as to his abusive treatment of Janika on other occasions, combined with his complete lack of credibility and the repeated impeachment of his version of events on the evening Janika was killed, taken together provide overwhelming evidence that defendant killed Janika with malice by an intentional blow to her chest. Admission of the Keller testimony as to the details his 1993 "rampage" was harmless error.

V.

The BB Gun Experiment

In our prior opinion in this appeal, we agreed with defendant's contention that the trial court erred "in allowing [O]fficer Krastof to testify that the bruise marks on Janika's face appeared similar to the marks caused by shooting a fellow officer with a BB gun." We reasoned: "A witness may not give expert testimony on an experiment without a showing that the witness has the necessary expertise. 'The proponent of experimental

evidence bears the burden of production and proof on the question whether such evidence rests on an adequate foundation.' (*People v. Bonin* (1989) 47 Cal.3d 808, 847.) 'Admission of such evidence depends upon proof of the following foundational items: (1) The experiment must be relevant; (2) it must have been conducted under at least substantially similar, although not necessarily absolutely identical, conditions as those of the actual occurrence; (3) the qualifications of the individual testifying concerning the experimentation must be demonstrated with some particularity; and (4) evidence of the experiment will not consume undue time, confuse the issues, or mislead the jury.' (*People v. Turner* [(1994)] 8 Cal.4th [137,] 198.) [¶] Here, there was no showing that [O]fficer Krastof had any training, experience, or expertise regarding BB gun strike marks. Nor was there any showing of expertise to qualify him to given an opinion on whether an injury on an adult's arm resembles another injury on a child's face." (*People v. Johnson, supra,* A085450, typed opn. at pp. 28-29.)

Defense counsel objected to this evidence initially on grounds of lack of foundation. The court *sustained* the objection. The district attorney purported to lay the foundation for the officer's opinion by asking Krastof how he had tested the gun. Defense counsel *did not object* that the foundation was insufficient. Rather, after the lunch break, defense counsel moved for a mistrial "on prosecutorial misconduct, specifically, failure to provide discovery" about the BB gun test and the comparison with the bruising on Janika's face. The district attorney contended the information had been provided to defense counsel in discovery. After checking, defense counsel conceded, "Mr. Brown is correct in that it is in the police report" and that the police report was provided to him. Defense counsel did not withdraw his mistrial motion, but put it "on delay until Dr. Peterson's testimony" if it turned out that, unbeknownst to the defense, photographs of the injuries had been provided to Dr. Peterson and he concurred with Krastof's analysis. The court suggested defense counsel talk to Dr. Peterson and determine "if he wishes to renew the motion." The court concluded: "Right now I'll show it this way, Mr. Cannon: The motion is withdrawn unless you reraise it with me." Defense counsel responded: "That's a fine characterization." Counsel failed to object to

the adequacy of the foundation as purported to be laid, thus waiving that objection, and in effect withdrew and never renewed his motion for mistrial. Defendant has waived the error.

In order to forestall a claim of ineffective assistance of counsel, we address the issue of prejudice. Had the issue been properly preserved, defendant has failed to show prejudice. Defendant argues only that the "evidence of the supposed BB injury was so powerful. For this evidence would clearly cause the jury to believe that if [defendant] was a bad enough man to shoot the child with a BB gun, then surely he was a bad enough man to murder her." There was no assertion by the prosecution that *defendant* had shot Janika with a BB gun, and Dr. Peterson did not speculate that any of the bruises he identified could have come from a BB gun. He did not even say that the facial bruises could have been suffered on the night in question. The prosecutor never referred to this testimony in his closing argument. Krastof never held himself out as an expert in this area, and there is no reason to believe the jury gave the testimony undue weight. As for defendant's claim that the jury could use this evidence to speculate that defendant was "a bad enough man to murder [Janika]," Dr. Peterson's expert testimony that the child had been the victim of child abuse, the evidence concerning defendant's punching Janika in the stomach, and Shelton's testimony regarding defendant's treatment of Janika would have been far more powerful on that point.

Viewing the record as a whole, defendant has failed to show that, but for the erroneous admission of Krastof's testimony that the bruises on Janika's face looked similar to those made by the BB gun on the other officer's arm, he would have received a more favorable result at trial. (*People v. Watson, supra,* 46 Cal.2d at p. 836.)

VI.

Cumulative Error Claim

Finally, defendant contends that the cumulative effect of the trial court's errors requires reversal of the judgment. Based on our review of the entire record, defendant's contention fails. We have reviewed defendant's claims both individually and collectively. Even when we consider the few instances of error together, we remain

convinced beyond a reasonable doubt that they had no bearing on the outcome and did not render defendant's trial fundamentally unfair. (*Chapman v. California* (1967) 386 U.S. 18, 24.) Defendant was entitled to a trial "in which his guilt or innocence was fairly adjudicated." (*People v. Hill* (1998) 17 Cal.4th 800, 844.) He received such a trial. Unlike *People v. Hill*, in which "outrageous and pervasive misconduct" by the prosecutor led the court to reverse the judgment in a trial that was "rife with serious error" (*id.* at p. 815), we have found no instance of prosecutorial misconduct. Nor can we say the current trial in this case was "rife with serious error."

Disposition

The judgment is affirmed. The petition for writ of habeas corpus is denied.

Kline, P.J.

We concur:

Haerle, J.

Lambden, J.

APPENDIX E

Court of Appeal, First Appellate District, Division Two - Nos. A085450/A106431
S127602

IN THE SUPREME COURT OF CALIFORNIA

En Banc

THE PEOPLE, Plaintiff and Respondent,

v.

JAY SHAWN JOHNSON, Defendant and Appellant.

Petition for review DENIED.

Kennard, J., is of the opinion the petition should be granted.
Werdegar, J., was absent and did not participate.

SUPREME COURT
FILED

OCT 2 0 2004

Frederick K. Ohlrich Clerk

DEPUTY

Chief Justice